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MALCOLM LEADER-PICONE (*State Bar No. 104620*)
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OAKLAND, CA 94612
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Attorneys for Defendant, specially appearing
BROOKS HENDERSON HADEN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IRETA IRBY

Plaintiff,

vs.

BROOKS HENDERSON HADEN

Defendants.

) No. 3:08-c-80004-PJH

)

) **DECLARATION OF MALCOLM**

) **LEADER-PICONE IN SUPPORT OF**

) **MOTION OF DEFENDANT BROOKS**

) **HADEN FOR ORDER VACATING**

) **JANUARY 11, 2008 REGISTRATION OF**

) **FOREIGN JUDGMENT AND FOR**

) **PERMANENT INJUNCTION AGAINST**

) **ENFORCEMENT OF THE TEXAS**

) **JUDGMENT IN CALIFORNIA.**

)

) Date: May 14, 2008

) Time: 9:00 a.m.

) Crtm: 3, 17th Floor

) Hon. Phyllis J. Hamilton

)

)

DECLARATION OF MALCOLM LEADER-PICONE

I, Malcolm Leader-Picone, declare:

1. I am an attorney at law, licensed to practice before this Court, and counsel for plaintiff herein. I have personal knowledge of the matters stated herein and, if sworn, could and would testify competently thereto.

2. On November 17, 1988, plaintiff Ireta Irby obtained a judgment against defendant

1 Brooks Haden in the United States District Court for the Southern District of Texas ("Texas Judgment"). See,
2 *Exh. "A" to Nelson Decl.*, a courtesy copy of which is being served with this Application, and attached
3 electronically to the electronically filed Application.

4 3. On August 20, 1996, plaintiff registered the Texas Judgment in the Northern District
5 of California. A true and correct copy of the registration document is attached hereto as Exhibit "A". The
6 registered judgment, which will be referred to herein as the California Judgment, was assigned to Judge
7 Walker with the case number 3:96-fj-00034-VRW.

8 4. The California Judgment was never renewed and expired by operation of law on
9 August 20, 2006, ten years after it came into existence.

10 5. On October 16, 2007, plaintiff's counsel applied to renew the declaratory judgment
11 in Bankruptcy Court Case No. 97-01034, and the Bankruptcy Court Clerk, relying upon a Declaration of
12 Rhonda L. Nelson, issued a Renewal of Judgment in the amount of \$434,673.51. See, copy of Bankruptcy
13 Court docket that I printed out from PACER, which is Exhibit "C" hereto.

14 6. In moving to vacate the plaintiff's deceptive *ex parte* renewal of the Bankruptcy
15 Court judgment, my partner pointed out in our brief that a renewal of the California Judgment was time barred
16 under Code of Civil Procedure section 683.020. See, copy of brief attached hereto as Exhibit "D". the brief
17 also argued that the Bankruptcy Court judgment was merely a declaratory judgment and that the renewed
18 judgment improperly attempted to add in the amount of the Texas Judgment.

19 7. Plaintiff next moved to amend the Bankruptcy Court judgment, but the Court refused
20 to process the motion; leading plaintiff to withdraw the motion to amend. Attached hereto as Exhibit "E" is a
21 true and correct copy of plaintiff's Notice of Withdrawal of Motion to Amend Judgment, including the
22 attached email from Judge Jaroslovsky, informing plaintiff that it was not a mistake that the Bankruptcy Court
23 judgment was only a declaratory judgment and not a money judgment.

24 8. Plaintiff then stipulated to entry of an order vacating the improper renewal of the
25 bankruptcy judgment, but not until after plaintiff had re-registered the Texas Judgment on January 11, 2008.
26 See, copy of order attached hereto as Exhibit "F".

27 9. It is not unreasonable to infer that plaintiff's attempt to misleadingly renew the
28

11. The Clerk of this Court registered the Texas Judgment for a second time on January 11, 2008, under case number 3:08-mc-80004-PJH and assigned the case to the Hon. Phyllis J. Hamilton. See, *Exh. “C”* to the *Nelson Decl.*

13. According to the Court's docket for this action, a Writ of Execution was entered on March 3, 2008; and an Earnings Withholding Order was issued on March 7, 2008. A true and correct copy of those documents are attached hereto as Exhibit "B".

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1 15. I ask leave to file these moving papers after the April 4, 2008 deadline specified in the
2 Court's minutes and the Order filed April 2, 2008, because I was required in the interim to respond to an
3 application for an order shortening time and a motion to amend the judgment in the Bankruptcy Court, which
4 plaintiff filed on April 1, 2008, but which was received by me on April 2, 2008.

5 I declare under penalty of perjury under the laws of the United States of America that the
6 foregoing is true and correct.

7 DATED: April 11, 2008.

/s/ Malcolm Leader-Picone #104620
MALCOLM LEADER-PICONE

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PROOF OF SERVICE

I, Malcolm Leader-Picone, declare that:

I am employed in the County of Alameda, California. I am over the age of eighteen years and not a party to the within action. My business address is 2201 Broadway, Suite 803 Oakland, CA 94612.

On April 11, 2008, I served the following document(s) entitled:

**DECLARATION OF MALCOLM LEADER-PICONE IN SUPPORT OF MOTION OF
DEFENDANT BROOKS HADEN FOR ORDER VACATING JANUARY 11, 2008
REGISTRATION OF FOREIGN JUDGMENT AND FOR PERMANENT INJUNCTION
AGAINST ENFORCEMENT OF THE TEXAS JUDGMENT IN CALIFORNIA.**

upon the following person(s) in said action as follows:

By Email and UPS Overnight:

Rhonda I. Nelson, Esq.
Severson & Werson
One Embarcadero Center, Suite 2600
San Francisco, CA 94111

Telephone: 415-398-3344
Facsimile: 415-956-0439
Email: rln@severson.com

Chambers Copy By UPS Overnight:

Hon. Phyllis J. Hamilton
U.S. District Court Judge
U.S. District Court, Crtrm. 3, 17th Floor
U.S. Courthouse/Phillip Burton Building
450 Golden Gate Avenue
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Oakland, California, on April 11, 2008.

/s/ Malcolm Leader-Picone #104620

Malcolm Leader-Picone

AO 451 (Rev. 11/91) Certification of Judgment

ORIGINAL
FILED

AUG 20 1996

United States District Court

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT CALIFORNIA

SOUTHERN DISTRICT OF TEXAS

IRETA IRBY

V.

CERTIFICATION OF JUDGMENT FOR REGISTRATION IN ANOTHER DISTRICT

BROOKS H. HADEN

Case Number: H-88-1781

I, MICHAEL MILBY

CLERK OF THE UNITED STATES DISTRICT COURT

VRW

certify that the attached judgment is a true and correct copy of the original judgment entered in this action on

November 21, 1988

Date

, as it appears in the records of this court, and that

*

no notice of appeal from this judgment has been filed, and no motion of any kind listed in Rule 4(a) of the Federal Rules of Appellate Procedure has been filed.

IN TESTIMONY WHEREOF, I sign my name and affix the seal of this Court.

August 14, 1996
Date

MICHAEL MILBY

Clerk

James M. Curran
(By) Deputy Clerk

*Insert the appropriate language: ... "no notice of appeal from this judgment has been filed, and no motion of any kind listed in Rule 4(a) of the Federal Rules of Appellate Procedure has been filed." ... "no notice of appeal from this judgment has been filed, and any motions of the kinds listed in Rule 4(a) of the Federal Rules of Appellate Procedure (t) have been disposed of, the latest order disposing of such a motion having been entered on [date]." ... "an appeal was taken from this judgment and the judgment was affirmed by mandate of the Court of Appeals issued on [date]." ... "an appeal was taken from this judgment and the appeal was dismissed by order entered on [date]."

(t)Note: The motions listed in Rule 4(a), Fed. R. App. P., are motions: for judgment notwithstanding the verdict; to amend or make additional findings of fact; to alter or amend the judgment; for a new trial; and for an extension of time for filing a notice of appeal.)

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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

FILED

11-17-88

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JESSE E. CLARK, CLERK
BY DEPUTY

[Signature]

IRETA IRBY

VS.

BROOKS H. HADEN

X
X
X
X
X

CIVIL ACTION NO. H-88-1781

JUDGMENT

On this day came on to be heard Plaintiff's Motion for Default Judgment in the above styled cause, and it appearing to the court that Defendant, though duly summoned to appear and answer herein, has wholly failed to appear and answer herein, that appearance day for Defendant has passed, and that Plaintiff's cause of action is based upon a liquidated demand, the court finds that Plaintiff is entitled to judgment by default as prayed for.

It is ORDERED, ADJUDGED, and DECREED that Plaintiff, IRETA IRBY, recover from Defendant, BROOKS H. HADEN, Judgment in the total sum of \$87,450.00 (which includes Plaintiff's principal claim of \$75,000.00, plus pre-judgment interest on the principal claim of \$4,500.00, plus attorney's fees of \$7,950.00) together with interest at the legal rate on the total amount from the date of this Judgment until paid, and for all costs of court spent in this cause, for all of which let execution issue.

DONE at Houston, Texas this 17 day of Nov., 1988.

TRUE COPY I CERTIFY

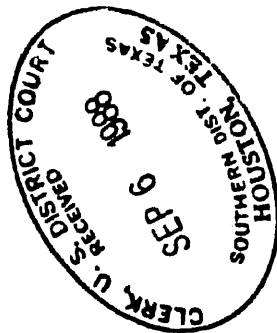
ATTEST:

MICHAEL N. MILBY, CLERK

By *[Signature]*
Deputy Clerk


UNITED STATES DISTRICT JUDGE

2008



CLERK, U. S. DISTRICT COURT
RECEIVED DOCKET SECTION
HOUSTON, TEXAS
SOUTHERN DISTRICT OF TEXAS

NOV 21 1988

PM
1, 2, 3, 4, 5, 6

WG-002

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): RHONDA L. NELSON SEVERSON & WERSON One Embarcadero Center Ste 2600 San Francisco, CA 94111		TELEPHONE AND FAX NOS.: (415) 398-3344 (415) 956-0439	LEVYING OFFICER (Name and Address): United States Marshal - Sn Francisco 450 Golden Gate, 26th Floor San Francisco CA,
ATTORNEY FOR (Name):			
NAME OF COURT, JUDICIAL DISTRICT, AND BRANCH, IF ANY: UNITED STATES DISTRICT COURT, NORTHERN DISTRICT Northern			
PLAINTIFF: IRETA IRBY			
DEFENDANT: BROOKS H. HADEN			
EARNINGS WITHHOLDING ORDER (Wage Garnishment)		LEVYING OFFICER FILE NO.	COURT CASE NO. CV-08-80004MISC-PJ

EMPLOYEE: KEEP YOUR COPY OF THIS LEGAL PAPER. EMPLEADO: GUARDE ESTE PAPEL OFICIAL.

EMPLOYER: Enter the following date to assist your record keeping:

Date this order was received by employer (specify the date of personal delivery by levying officer or registered process server or the date mail receipt was signed:

TO THE EMPLOYER REGARDING YOUR EMPLOYEE:

Name and address of employer

**Mechanics Bank
3170 Hilltop Mall Rd.
Richmond, CA, 94806**

Name and address of employee

**BROOKS H. HADEN
1709 Broderick St.
San Francisco, CA, 94115**

Social Security Number (if known)

A judgement creditor has obtained this order to collect a court judgment against your employee. You are directed to withhold part of the earnings of the employee (see instructions on reverse of this form). Pay the withheld sums to the **levying officer** (name and address above).

If the employee works for you now, you must give the employee a copy of this order and the **Employee Instructions** (form 982.5(A)) within 10 days after receiving this order.

Complete both copies of the Employer's Return (form 982.5(4)) and mail them to the levying officer within 15 days after receiving this order, whether or not the employee works for you.

2. The total amount due is: \$393867.0400 + \$45.0000 sheriff fee + \$10.00/ check assessment + daily interest (102.1700)/day
Count 10 calendar days from the date when you received this order. If your employee's pay period ends before the tenth day, **do not** withhold earnings payable for that pay period. **Do** withhold from earnings that are payable for any pay period ending on or after that tenth day. * **Contact sheriff for final payoff**

Continue withholding for all pay periods until you withhold the amount due. The levying officer will notify you of an assessment you should withhold in addition to the amount due. Do not withhold more than the total of these amounts. Never withhold any earnings payable before the beginning of the earnings withholding period.

The judgment was entered in the court on (date) **11-17-88**

The judgment creditor (if different from the plaintiff) is (name): **IRETA IRBY**

4. The **Employer's Instructions** on the reverse tell you how much of the employee's earnings to withhold each payday and answer other questions you may have.

Date: **March 7, 2008**

(TYPE OR PRINT NAME)



LEVYING OFFICER



REGISTERED PROCESS SERVER

(Employer's Instructions on reverse)

**EARNINGS WITHHOLDING ORDER
(Wage Garnishment)**

Exhibit **B**

WG-002

EMPLOYER'S INSTRUCTIONS EARNINGS WITHHOLDING ORDERS

COMPUTATION INSTRUCTIONS

The instructions in paragraph 1 on the reverse of this form describe your early duties to provide information to your employee and the levying officer.

Your other duties are TO WITHHOLD THE CORRECT AMOUNT OF EARNINGS (if any) and PAY IT TO THE LEVYING OFFICER during the withholding period.

The withholding period is the period covered by the *Earnings Withholding Order* (this order). The withholding period begins ten (10) calendar days after you receive the order and continues until the total amount due, plus additional amounts for costs and interest (which will be listed in a levying officer's notice), is withheld.

It may end sooner if (1) you receive a written notice signed by the levying officer specifying an earlier termination date, or (2) an order of higher priority (explained on the reverse of the *Employer's Return*) is received.

You are entitled to rely on and must obey all written notices signed by the levying officer.

The *Employer's Return* (form 982.5(4)) describes several situations that could affect the withholding period for this order. If you receive more than one *Earnings Withholding Order* during a withholding period, review that form (*Employer's Return*) for instructions.

If the employee stops working for you, the *Earnings Withholding Order* ends after no amounts are withheld for a continuous 180 day period. If withholding ends because the earnings are subject to an order of higher priority, the *Earnings Withholding Order* ends after a continuous two year period during which no amounts are withheld under the order.

Return the *Earnings Withholding Order* to the levying officer with a statement of the reason it is being returned.

WHAT TO DO WITH THE MONEY

The amounts withheld during the withholding period must be paid to the levying officer by the 15th of the next month after each payday. If you wish to pay more frequently than monthly, each payment must be made within ten (10) days after the close of the pay period.

Be sure to mark each check with the case number, the levying officer's file number, if different, and the employee's name so the money will be applied to the correct account.

WHAT IF YOU STILL HAVE QUESTIONS?

The garnishment law is contained in the Code of Civil Procedure beginning with section 706.010. Sections 706.022, 706.025, and 706.104 explain the employer's duties.

The Federal Wage Garnishment Law and federal rules provide the basic protections on which the California law is based. Inquiries about the federal law will be answered by mail, telephone, or personal interview at any office of the Wage and Hour Division of the U.S. Department of Labor. Offices are listed in the telephone directory under the U.S. Department of Labor in the U.S. Government listing.

THE CHART BELOW AND THESE INSTRUCTIONS DO NOT APPLY TO ORDERS FOR THE SUPPORT OF A SPOUSE, FORMER SPOUSE, OR CHILD.

The chart below shows HOW MUCH TO WITHHOLD when the federal minimum wage is \$5.85 per hour.

If the FEDERAL minimum wage changes in the future, the levying officer will provide a chart showing the new withholding rates.

FEDERAL MINIMUM WAGE: \$5.85 per hour

(Beginning July 24, 2007 and continuing until July 23, 2008.)

PAY PERIOD	Daily	Weekly	Every Two Weeks	Twice a Month	Monthly
DISPOSABLE EARNINGS	\$0-\$175.50	\$0-\$175.50	\$0-\$351.00	\$0-\$380.25	\$0-\$760.50
Withhold	None	None	None	None	None
DISPOSABLE EARNINGS	\$175.51-\$234.00	\$175.51-\$234.00	\$351.01-\$468.00	\$380.26-\$507.00	\$760.51-\$1,014.00
Withhold	Amount above \$175.50	Amount above \$175.50	Amount above \$351.00	Amount above \$380.25	Amount above \$760.50
DISPOSABLE EARNINGS	\$234.01 or More	\$234.01 or More	\$468.01 or More	\$507.01 or More	\$1,014.01 or More
Withhold	Maximum of 25% of Disposable Earnings	Maximum of 25% of Disposable Earnings	Maximum of 25% of Disposable Earnings	Maximum of 25% of Disposable Earnings	Maximum of 25% of Disposable Earnings

State and federal law limits the amount of earnings that can be withheld. The limitations are based on the employee's disposable earnings, which are different from gross pay or take-home pay.

To determine the CORRECT AMOUNT OF EARNINGS TO BE WITHHELD (if any), compute the employee's disposable earnings.

(A) Earnings include any money (whether called wages, salary, commissions, bonuses, or anything else) that is paid by an employer to an employee for personal services. Vacation or sick pay is subject to withholding as it is received by the employee. Tips are generally not included as earnings since they are not paid by the employer.

(B) Disposable earnings are the earnings left after subtracting the part of the earnings a state or federal law requires an employer to withhold. Generally these required deductions are (1) federal income tax, (2) federal social security, (3) state income tax, (4) state disability insurance, and (5) payments to public employee retirement systems. Disposable earnings will change when the required deductions change.

After the employee's disposable earnings are known, use the chart below to determine what amount should be withheld. In the column listed under the employee's pay period, find the employee's disposable earnings. The amount shown below that is the amount to be withheld. For example, if the employee is paid disposable earnings of \$500 twice a month (semi-monthly), the correct amount to withhold is 25 percent each payday, or \$125.

The chart below is based on the minimum wage that was effective September 1, 1997. It will change if the minimum wage changes. Restrictions are based on the minimum wage effective at the time the earnings are payable.

Occasionally, the employee's earnings will also be subject to a *Wage and Earnings Assignment Order*, an order available from family law courts for child, spousal, or family support. The amount required to be withheld for that order should be deducted from the amount to be withheld for this order.

—IMPORTANT WARNINGS—

1. IT IS AGAINST THE LAW TO FIRE THE EMPLOYEE BECAUSE OF EARNINGS WITHHOLDING ORDERS FOR THE PAYMENT OF ONLY ONE INDEBTEDNESS. No matter how many orders you receive, so long as they all relate to a single indebtedness (no matter how many debts are represented in that judgment) the employee may not be fired.

2. IT IS ILLEGAL TO AVOID AN EARNINGS WITHHOLDING ORDER BY POSTPONING OR ADVANCING THE PAYMENT OF EARNINGS. The employee's pay period must not be changed to prevent the order from taking effect.

3. IT IS ILLEGAL NOT TO PAY AMOUNTS WITHHELD FOR THE EARNINGS WITHHOLDING ORDER TO THE LEVYING OFFICER. Your duty is to pay the money to the levying officer who will pay the money in accordance with the laws that apply to this case.

IF YOU VIOLATE ANY OF THESE LAWS, YOU MAY BE HELD LIABLE TO PAY CIVIL DAMAGES AND YOU MAY BE SUBJECT TO CRIMINAL PROSECUTION!

EMPLOYEE INSTRUCTIONS**—NOTICE—****IMPORTANT LEGAL NOTICE TO EMPLOYEE
ABOUT EARNINGS WITHHOLDING ORDERS
(Wage Garnishment)**

The **Earnings Withholding Order** requires your employer to pay part of your earnings to the sheriff or other levying officer. The levying officer will pay the money to a creditor who has a court judgment against you. The information below may help you protect the money you earn.

—NOTICIA—**NOTICIA LEGAL IMPORTANTE RESPECTO
A LAS ORDENES DE RETENCION DE SUELDO**

El **Orden de Retención de Sueldo** requiere que su empleador pague una parte de su sueldo a un oficial de retención. El oficial le pagará el dinero retenido a su acreedor que ha conseguido una decisión judicial en contra de Ud. Pida Ud. que un amigo o su abogado le lea este papel oficial. Esta información le podría ayudar a proteger su sueldo.

CAN YOU BE FIRED BECAUSE OF THIS?

NO. You cannot be fired unless your earnings have been withheld before for a different court judgment. If this is the first judgment for which your wages will be withheld and your employer fires you because of this, the California Labor Commissioner, listed in the phone book of larger cities, can help you get your job back.

HOW MUCH OF YOUR PAY WILL BE WITHHELD?

The reverse of the Earnings Withholding Order (abbreviated in this notice as **EWO**) that applies to you contains Employer Instructions. These explain how much of your earnings can be withheld. Generally, the amount is about 25% of your take home pay until the amount due has been withheld. The levying officer will notify the employee of an additional assessment charged for paying out money collected under this order and that amount will also be withheld. If you have trouble figuring this out, ask your employer for help.

IS THERE ANYTHING YOU CAN DO?

YES. There are several possibilities.

1. See an attorney. If you do not know an attorney, check with the lawyer referral service or the legal aid office in your county (both are listed in the yellow pages under "Attorneys").

An attorney may be able to help you make an agreement with your creditor, or may be able to help you stop your earnings from being withheld. You may wish to consider bankruptcy or asking the bankruptcy court to help you pay your creditors. These possibilities may stop your wages from being withheld.

An attorney can help you decide what is best for you. Take your **EWO** to the attorney to help you get the best advice and the fastest help.

2. Try to work out an agreement yourself with your creditor. Call the creditor or the creditor's attorney, listed on the **EWO**. If you make an agreement, the withholding of your wages will stop or be changed to a smaller amount you agree on. (See item 4 on the reverse for another way to make an offer to your creditor.)
3. You can ask for an **EXEMPTION**. An exemption will protect more, or maybe even all of your earnings. You can get an exemption if you need your earnings to support yourself or your family, but you cannot get an exemption if
 - a. You use some of your earnings for luxuries and they aren't really necessary for support; OR
 - b. The money you owe is for food, clothing, medical care, or housing; OR
 - c. You owe the debt for past due child support or spousal support (alimony); OR
 - d. You owe the debt to a former employee for wages.

HOW DO YOU ASK FOR AN EXEMPTION?

(See the reverse of this form for instructions about claiming an exemption.)

(Continued on reverse)

HOW DO YOU ASK FOR AN EXEMPTION?**WG-003**

1. Call or write the levying officer for three (3) copies each of the forms called "Claim of Exemption" and "Financial Statement." These forms are free. The name and address of the levying officer are in the big box on the right at the top of the **EWO**.
2. Fill out both forms. On the forms are some sentences or words which have boxes in front of them. The box means the words which follow may not apply to your case. If the words do apply, put a check in the box.

Remember, it is your job to prove with the Financial Statement form that your earnings are needed for support. Write down the details about your needs.
3. For example, if your child has special medical expenses, tell which child, what illnesses, who the doctor is, how often the doctor must be visited, the cost per visit, and the costs of medicines. These details should be listed in item 6. If you need more space, put "See attachment 6" and attach a typed 8½ by 11 sheet of paper on which you have explained your expenses in detail.
4. You can use the Claim of Exemption form to make an offer to the

judgment creditor to have a specified amount withheld each pay period. Complete item 3 on the form to indicate the amount you agree to have withheld **each pay day during the withholding period**. (Be sure it's less than the amount to be withheld otherwise.) If your creditor accepts your offer, he will not oppose your claim of exemption. (See (1) below.)

Sign the Claim of Exemption and Financial Statement forms. Be sure the Claim of Exemption form shows the address where you receive mail.

Mail or deliver two (2) copies of each of the two forms to the levying officer. Keep one copy for yourself in case a court hearing is necessary.

Do not use the Claim of Exemption and Financial Statement forms to seek a modification of child support or alimony payments. These payments can be modified only by the family law court that ordered them.

FILE YOUR CLAIM OF EXEMPTION AS SOON AS POSSIBLE FOR THE MOST PROTECTION.

ONE OF TWO THINGS WILL HAPPEN NEXT

- (1) The judgment creditor will not oppose (object to) your claim of exemption. If this happens, after 10 days the levying officer will tell your employer to stop withholding or withhold less from your earnings. The part (or all) of your earnings needed for support will be paid to you or paid as you direct. And you will get back earnings the levying officer or your employer were holding when you asked for the exemption.

—OR—

- (2) The creditor will oppose (object to) your claim of exemption. If this happens, you will receive a Notice of Opposition and Notice of Hearing on Claim of Exemption, in which the creditor states why your exemption should not be allowed. A box in the middle of the Notice of Hearing tells you the time and place of the court hearing which will be in about ten days. Be sure to go to the hearing if you can.

If the judgment creditor has checked the box in item 3 on the Notice of Hearing on Claim of Exemption, the creditor will not be in court. If you are willing to have the court make its decision based on your Financial Statement and the creditor's Notice of Opposition, you need not go to the hearing.

The Notice of Opposition to Claim of Exemption will tell you why the creditor thinks your claim should not be allowed. If you go to the hearing, take any bills, paycheck stubs, cancelled checks, or other evidence (including witnesses) that will help

you prove your Claim of Exemption and Financial Statement are correct and your earnings are needed to support yourself or your family.

Perhaps you can even prove the Notice of Opposition is wrong. For example, perhaps the Notice of Opposition states that the judgment was for a common necessary of life. This term is generally taken by courts to mean only the essentials that everyone needs to live; sometimes a court will have to decide the matter. For example, while a coat may be a "common necessary," a fur coat may not be.

If the judge at the hearing agrees with you, your employer will be ordered to stop withholding your earnings or withhold less money. The judge can even order that the **EWO** end before the hearing (so you would get some earnings back).

If the judge does not agree with you, the withholding will continue unless you **appeal** to a higher court. The rules for appeals are complex so you should see an attorney if you want to appeal.

If you have one court hearing, you should not file another Claim of Exemption about the same **EWO** unless your finances have gotten worse in an important way.

If your **EWO** is to be changed or ended, the levying officer must sign the notice to your employer of the change. He may give you permission to deliver it to the employer, or it can be mailed.

WHAT HAPPENS TO YOUR EARNINGS IF YOU FILE A CLAIM OF EXEMPTION?

Your employer must continue to hold back part of your earnings for the **EWO** until he receives a notice signed by the levying officer to change the order or end it early.

The levying officer will keep your withheld earnings until your Claim of Exemption is denied or takes effect. At that time your earnings will be paid according to the law that applies to your case.

REGARDING CHILD SUPPORT

If you are obligated to make child support payments, the family support division of your district attorney's office may help you to have an Order Assigning Salary or Wages entered. This order has the top priority claim on your earnings. When it is in effect, little or no money may be

available to be withheld for an **EWO**. And, if the district attorney is involved in collecting this support from you, he may agree to accept less money if this special order is entered.

WHAT IF YOU STILL HAVE QUESTIONS?

If you cannot see an attorney, or don't want to see an attorney, you might be able to answer some of your questions by reading the law in a law library. Ask the law librarian to help you find sections 706.050 and 706.105 of the California Code of Civil Procedure. Other sections of the code, beginning with section 706.010 may also answer some of your questions.

Also, the office of the Wage and Hour Division of the U.S. Department of Labor may be able to answer some of your questions. Offices are listed in the telephone directory under the U.S. Department of Labor in the U.S. Government listing.

PreAct, REOPENED, CLOSED

**U.S. Bankruptcy Court
Northern District of California (Santa Rosa)
Adversary Proceeding #: 97-01034**

Assigned to: Judge Alan Jaroslovsky
Related BK Case: 96-13933
Related BK Title: Brooks Henderson Haden
Related BK Chapter: 7
Demand:

Date Filed: 02/13/97
Date Terminated: 03/18/08
Date Dismissed: 06/02/00

Nature[s] of Suit: 62 Dischargeability - 523(a)(2), false
pretenses, false representation, actual
fraud

Plaintiff

Ireta Irby

represented by **Rhonda L. Nelson**
Law Offices of Severson and Werson
1 Embarcadero Center #2600
San Francisco, CA 94111
(415) 398-3344
Email: rln@severson.com
LEAD ATTORNEY
Sharon D. Silverman
Law Offices of Lofton and De Lancie
44 Montgomery St. #1660
San Francisco, CA 94104-2700
(415) 772-1900
TERMINATED: 05/28/1998
LEAD ATTORNEY

V.

Defendant

Brooks H. Haden

represented by **Kaipo K.B. Young**
Bartlett , Leader-Picone and Young, LLP
2201 Broadway #803
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Exhibit C

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Filing Date	#	Docket Text
10/16/2007	<u>47</u>	Application for Renewal of Judgment - <i>Notice to be issued by the Clerk</i> . Filed by Plaintiff Ireta Irby. (Attachments: # <u>1</u> Exhibit Notice of Renewal of Judgment) (Nelson, Rhonda) (Entered: 10/16/2007)
10/16/2007	<u>48</u>	Declaration of Rhonda L. Nelson <i>Regarding Post-Judgment Interest on Renewal of Judgment 28 U.S.C. section 1961</i> . Filed by Plaintiff Ireta Irby (Nelson, Rhonda) (Entered: 10/16/2007)
11/08/2007	<u>49</u>	Application for Renewal of Judgment - <i>Notice of Renewal to be issued by Clerk - Attached as Exhibit C</i> . Filed by Plaintiff Ireta Irby. (Attachments: # <u>1</u> Exhibit Exhibit A# <u>2</u> Exhibit Exhibit B# <u>3</u> Exhibit Exhibit C) (Nelson, Rhonda) (Entered: 11/08/2007)
11/08/2007	<u>50</u>	First Amended Declaration of Rhonda L. Nelson in Regarding Post-Judgment Interest on Renewal of Judgment 28 U.S.C. Sec. 1961 of (RE: related document(s) <u>49</u> Application for Renewal of Judgment). Filed by Plaintiff Ireta Irby (Attachments: # <u>1</u> Exhibit A# <u>2</u> Exhibit B# <u>3</u> Exhibit C) (Nelson, Rhonda) Modified on 11/9/2007 Incorrect pdf attached for the event code used. Registered Participant should refile the First Amended Declaration. (lj,). (Entered: 11/08/2007)
11/09/2007		**NOTICE OF DEFECTIVE ENTRY** Incorrect pdf attached for the event code used. Registered Participant should refile the First Amended Declaration.(RE: related document(s) <u>50</u> Declaration filed by Plaintiff Ireta Irby). (lj,) (Entered: 11/09/2007)
11/14/2007	<u>51</u>	First Amended Declaration of Rhonda L. Nelson <i>Regarding Post-Judgment Interest on Renewal of Judgment</i> (RE: related document(s) <u>49</u> Application for Renewal of Judgment). Filed by Plaintiff Ireta Irby (Attachments: # <u>1</u> Exhibit A# <u>2</u> Exhibit B# <u>3</u> Exhibit C) (Nelson, Rhonda) (Entered: 11/14/2007)
11/15/2007	<u>52</u>	Notice of Renewal of Judgment in the Amount of \$434,673.51 (With Certificate of Mailing) (RE: related document(s) <u>49</u> Application for Renewal of Judgment filed by Plaintiff Ireta Irby). (lj,) (Entered: 11/15/2007)

		11/15/2007)
12/14/2007	<u>54</u>	Motion <i>For Order Vacating Judgment Creditor's Renewal of Judgment; Memorandum</i> Filed by Defendant Brooks H. Haden. (Attachments: # <u>1</u> Certificate of Service) (Young, Kaipo) (Entered: 12/14/2007)
12/14/2007	<u>55</u>	Declaration of Kaipo K.B. Young in Support of <i>Defendant's Motion</i> (RE: related document(s) <u>54</u> Motion Miscellaneous Relief). Filed by Defendant Brooks H. Haden (Attachments: # <u>1</u> Exhibit A# <u>2</u> Exhibit B# <u>3</u> Exhibit C# <u>4</u> Exhibit D# <u>5</u> Exhibit E) (Young, Kaipo) (Entered: 12/14/2007)
12/14/2007	<u>56</u>	Notice of Hearing <i>on Defendant's Motion</i> (RE: related document(s) <u>54</u> Motion Miscellaneous Relief filed by Defendant Brooks H. Haden). Hearing scheduled for 1/25/2008 at 10:00 AM at Santa Rosa Courtroom - Jaroslovsky. Filed by Defendant Brooks H. Haden. (Young, Kaipo) (Entered: 12/14/2007)
12/17/2007	<u>57</u>	Order to Reopen Case . (lj,) (Entered: 12/17/2007)
12/21/2007	<u>58</u>	Notice of Hearing <i>Notice of Motion to Amend Judgment Pursuant to Bankruptcy Procedure Rule 9024 and FRCP 60(a) and (b)(6)</i> Hearing scheduled for 1/25/2008 at 10:00 AM at Santa Rosa Courtroom - Jaroslovsky. Filed by Plaintiff Ireta Irby. (Nelson, Rhonda) Linked document to docket entry #61. Modified on 12/27/2007 (kl,). (Entered: 12/21/2007)
12/21/2007	<u>59</u>	Memorandum of Points and Authorities in Support of <i>Motion to Amend Judgment Pursuant to Bankruptcy Procedure Rule 9024 and FRCP 60(a) and (b)(6)</i> (RE: related document(s) <u>58</u> Notice of Hearing,). Filed by Plaintiff Ireta Irby (Nelson, Rhonda) Linked document to docket entry #61. Modified on 12/27/2007 (kl,). (Entered: 12/21/2007)
12/21/2007	<u>60</u>	Declaration of Rhonda L. Nelson in Support of <i>Motion to Amend Judgment Pursuant to Bankruptcy Procedure Rule 9024 and FRCP 60(a) and (b)(6)</i> (RE: related document(s) <u>58</u> Notice of Hearing,). Filed by Plaintiff Ireta Irby (Attachments: # <u>1</u> Exhibit A# <u>2</u> Exhibit B# <u>3</u> Exhibit C) (Nelson, Rhonda) Linked document to docket entry #61. Modified on 12/27/2007 (kl,). (Entered: 12/21/2007)
12/26/2007	<u>61</u>	Motion to Amend <i>Judgment Pursuant to Bankruptcy Procedure Rule 9024 and FRCP 60(a) and (b)(6)</i> Filed by Plaintiff Ireta Irby (Nelson, Rhonda) Create linkage with docket entries #58,#59 and #60.Modified on 12/27/2007 (kl,). (Entered: 12/26/2007)

01/11/2008	<u>62</u>	Brief/Memorandum in Opposition to <i>Motion to Amend Judgment</i> (RE: related document(s) <u>61</u> Motion to Amend). Filed by Defendant Brooks H. Haden (Attachments: # <u>1</u> Exhibit "A" Copy of Ruling on Appeal November 18, 1998) (Leader-Picone, Malcolm) (Entered: 01/11/2008)
01/11/2008	<u>63</u>	Memorandum of Points and Authorities in of <i>Support of the Opposition to the Motion for Order Vacating Judgment Creditor's Renewal of Judgment</i> (RE: related document(s) <u>54</u> Motion Miscellaneous Relief). Filed by Plaintiff Ireta Irby (Attachments: # <u>1</u> Exhibit Attachment) (Nelson, Rhonda) (Entered: 01/11/2008)
01/11/2008	<u>64</u>	Declaration of Rhonda L. Nelson in <i>Support of the Opposition to the Motion for Order Vacating Judgment Creditor's Renewal of Judgment</i> (RE: related document(s) <u>54</u> Motion Miscellaneous Relief). Filed by Plaintiff Ireta Irby (Attachments: # <u>1</u> Exhibit A# <u>2</u> Exhibit B# <u>3</u> Exhibit C# <u>4</u> Exhibit D# <u>5</u> Exhibit E# <u>6</u> Exhibit F# <u>7</u> Exhibit G) (Nelson, Rhonda) (Entered: 01/11/2008)
01/11/2008	<u>65</u>	Notice Regarding <i>Withdrawal of Motion to Amend Judgment Pursuant to Bankruptcy Procedure Rule 9024 and FRCP 60(a) and (b)(6)</i> (RE: related document(s) <u>61</u> Motion to Amend filed by Plaintiff Ireta Irby). Filed by Plaintiff Ireta Irby. (Attachments: # <u>1</u> Exhibit Attachment) (Nelson, Rhonda) (Entered: 01/11/2008)
01/11/2008	<u>66</u>	Certificate of Service re <i>Memorandum of Points and Authorities in Support of the Opposition to the Motion for Order Vacating Judgment Creditor's Renewal of Judgment</i> (RE: related document(s) <u>64</u> Declaration,, <u>63</u> Memo of Points & Authorities,). Filed by Plaintiff Ireta Irby (Nelson, Rhonda) (Entered: 01/11/2008)
01/11/2008	<u>67</u>	Certificate of Service re <i>Notice of Withdrawal of Motion to Amend Judgment Pursuant to Bankruptcy Procedure Rule 9024 and FRCP 60(a) and (b)(6)</i> (RE: related document(s) <u>65</u> Notice,). Filed by Plaintiff Ireta Irby (Nelson, Rhonda) (Entered: 01/11/2008)
01/18/2008	<u>68</u>	Order Vacating Judgment Creditor's Renewal of Judgment.(Related Doc # <u>54</u> Motion For Order Vacating Judgment Creditor's Renewal of Judgment;) (lj,) (Entered: 01/22/2008)
01/25/2008		Hearing Held (RE: related document(s) <u>54</u> Motion For Order Vacating Judgment Creditor's Renewal of Judgment filed by Defendant Brooks H. Haden). (Before hearing, off calendar. Order granting motion filed on 1/18/08.) (ds,) (Entered: 01/25/2008)
03/18/2008		Adversary Case Closed 97-1034. (lj,) (Entered: 03/18/2008)

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Attorneys for Defendant and Judgment Debtor
 BROOKS H. HADEN

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
 BROOKS H. HADEN,
 Debtor.

IRETA IRBY,
 Plaintiff,

v.
 BROOKS H. HADEN,
 Defendant.

Case No. 96-13933 AJ

Chapter 7

Adv. Proc. No. 97-1034 AJ

**MOTION FOR ORDER VACATING
 JUDGMENT CREDITOR'S RENEWAL OF
 JUDGMENT; MEMORANDUM.**

Date: January 25, 2008

Time: 10:00 a.m.

Dept.: U.S. Bankruptcy Court
 99 South "E" Street
 Santa Rosa, CA 95404

Honorable Alan Jaroslovsky

Defendant and judgment debtor Brooks H. Haden moves the Court for an order vacating plaintiff and judgment creditor Ireta Irby's renewal of judgment filed November 8, 2007.

Mr. Haden moves for an order vacating plaintiff and judgment creditor Ireta Irby's renewal of judgment on the grounds that the Court lacks jurisdiction to renew the judgment and said renewal should have been filed in the United States District Court for the Northern District of California. More importantly, even if this Court were to determine that jurisdiction is proper, plaintiff is nonetheless time-barred from seeking a renewal under Code of Civil Procedure section 683.020.

This Motion shall be based on these moving papers, the attached Declaration of Kaipo

**MOTION FOR ORDER VACATING RENEWAL
 OF JUDGMENT**

Adv. Proc. No. 97-1034 AJ

Case: 97-01034

Doc #: 54

Filed: 12/14/2007

Page 1 of 10

Exhibit p

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1 K.B. Young, and any further evidence or argument that may be presented prior to or at the hearing on
2 the Motion.

3 DATED: December 14, 2007

BARTLETT, LEADER-PICONE & YOUNG, LLP

4
5 BY: /s/ Kaipo K.B. Young #164718

KAIPO K.B. YOUNG

6 Attorney for Defendant and Judgment Debtor

7 BROOKS H. HADEN
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**MOTION FOR ORDER VACATING RENEWAL
OF JUDGMENT**

Adv. Proc. No. 97-1034 AJ

Case: 97-01034 Doc #: 54 Filed: 12/14/2007 Page 2 of 10

1 **MEMORANDUM**

2 Defendant and judgment creditor Brooks H. Haden submits this memorandum in
3 support of his motion for order vacating plaintiff and judgment creditor Ireta Irby's renewal of
4 judgment filed November 8, 2007.

5 **INTRODUCTION**

6 This saga began on November 17, 1988 when plaintiff obtained a default money
7 judgment against Mr. Haden in the United States District Court for the Southern District of Texas for
8 the sum of \$87,450.00. Plaintiff later registered her Texas judgment with the United States District
9 Court for the Northern District of California on August 20, 1996.

10 When Mr. Haden filed for bankruptcy protection under Chapter 7 of the Bankruptcy
11 Code on November 14, 1996, plaintiff initiated a nondischargeability complaint against him. After a
12 trial was conducted, the Court found in favor of the plaintiff and a judgment was entered on April 28,
13 1998. The bankruptcy court judgment clearly states that

14 Irby's Judgment against Haden, entered on November 17, 1988, in the
15 United States District Court for the Southern District of Texas, Civil
16 Action No. H-88-1781, is deemed nondischargeable pursuant to
17 Bankruptcy Code Section 523(a)(2)(A). Irby shall recover her costs of suit
18 in the amount of \$685.20.

19 On November 8, 2007 plaintiff filed with the bankruptcy court her application for and
20 renewal of judgment. By and through her application, plaintiff seeks to renew her bankruptcy court
21 judgment for \$434,673.51, representing the original Texas judgment in the amount of \$87,450.00 plus
22 interest after judgment in the sum of \$347,223.51. Plaintiff's renewal of judgment does not included
23 her previously awarded costs of \$685.20.

24 Plaintiff's renewal of judgment must be vacated for two reasons. First, this Court lacks
25 jurisdiction to renew the judgment as requested. Plaintiff obtained nothing more than a "declaratory
26 relief" judgment from this Court with respect to her Texas judgment. With the exception of a money
27 judgment to recover \$685.20 in costs, no other "money" judgment was entered. Plaintiff's renewal of
28 judgment goes beyond the scope of that which was previously awarded by the bankruptcy court. At
the very least, plaintiff should have filed her application for renewal of judgment in the venue where

1 the Texas judgment was first certified in California—the United States District Court for the Northern
2 District of California.

3 Second, even if this Court were to determine that jurisdiction is proper, plaintiff's
4 renewal of judgment must nonetheless be vacated for the mere fact that plaintiff's renewal of
5 judgment is time barred under Code of Civil Procedure section 683.020. Plaintiff's registration of her
6 Texas judgment with the District Court for the Northern District of California, under 28 U.S.C. section
7 1963, created a "new judgment" for statute of limitations purposes, giving plaintiff ten years from the
8 date of registration in which to satisfy the judgment. Plaintiff registered her Texas judgment on
9 August 20, 1996. The California period of limitations for enforcement of judgment is 10 years. If
10 plaintiff wanted to renew her judgment in California, the deadline was August 20, 2006. Plaintiff
11 failed to do so and is now time-barred. Plaintiff's renewal of judgment must therefore be vacated.

12 STATEMENT OF FACTS

13 The following is supported by the Declaration of Kaipo K.B. Young which is
14 concurrently filed herewith:

15 1. On November 17, 1988, plaintiff Ireta Irby obtained a default money judgment
16 against defendant Brooks H. Haden for the sum of \$87,450.00 in the United States District Court for
17 the Southern District of Texas, Houston Division, Case No. H-88-1781 ("Texas Judgment").

18 2. On August 20, 1996, plaintiff caused the Texas Judgment to be registered with
19 the United States District Court for the Northern District of California, San Francisco Division, Case
20 No. 3:96-fj-00034-VRW.

21 3. On November 14, 1996 Mr. Haden filed a voluntary petition under chapter 7 of
22 the Bankruptcy Code, Case No. 96-13933, in the United States Bankruptcy Court for the Northern
23 District of California, Santa Rosa Division.

24 4. Thereafter, on February 13, 1997, plaintiff filed her nondischargeability
25 complaint against Mr. Haden, Adv. Proc. No. 97-01034 ("Adversary Proceeding").
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27
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1 5. On April 14, 1998, a trial was held in the Adversary Proceeding. Following the
2 trial, the Court, on April 28, 1998, entered a judgment in favor of plaintiff and against Mr. Haden
3 (“Adversary Judgment”). The Adversary Judgment specifically states as follows:

4 After hearing the evidence and arguments of counsel, judgment is hereby
5 entered in this action against debtor and defendant Brooks H. Haden
6 (“Haden”) in favor of plaintiff Ireta Irby (“Irby”) **determining that Irby’s**
7 **Judgment against Haden, entered on November 17, 1988, in the**
8 **United States District Court for the Southern District of Texas, Civil**
9 **Action No. H-88-1781, is deemed nondischargeable pursuant to**
10 **Bankruptcy Code Section 523(a)(2)(A). Irby shall recover her costs of**
11 **suit in the amount of \$685.20.** (Emphasis added)

12 6. On November 8, 2007 plaintiff filed her application for and renewal of
13 judgment with the Bankruptcy Court. By way of her application, plaintiff seeks to renew her judgment
14 for \$434,673.51, representing the original Texas judgment in the amount of \$87,450.00 plus interest
15 after judgment in the sum of \$347,223.51. Plaintiff’s application does not seek to renew her money
16 judgment for her previously awarded costs in the sum \$685.20.

17 7. On November 15, 2007, Mr. Haden was served with a Notice of Renewal of
18 Judgment. Pursuant to the Notice, Mr. Haden is required to make any motion to vacate the renewal
19 with 30 days after service of the Notice.

20 ARGUMENT

21 A. **THE BANKRUPTCY COURT LACKS JURISDICTION TO RENEW** 22 **THE JUDGMENT.**

23 Plaintiff’s renewal of judgment must be vacated because the bankruptcy court lacks
24 jurisdiction to renew the judgment as requested by plaintiff.

25 The Adversary Judgment entered on April 28, 1998, by its own terms, provides
26 plaintiff with the following limited relief--1) a declaration stating that the Texas judgment entered in
27 the United States District Court for the Southern District of Texas is **nondischargeable** and 2) a
28 money judgment for costs in the amount of \$685.20--NOTHING MORE. Through her application for
and renewal of judgment, however, plaintiff seeks to renew the Adversary Judgment for \$434,673.51,
comprising of the original Texas judgment in the amount of \$87,450.00 plus interest after judgment in
the sum of \$347,223.51.

1 The amount requested by plaintiff in her renewal of judgment goes well beyond the
2 scope of the limited relief which was awarded to plaintiff in the Adversary Judgment. With the
3 exception of the money judgment for costs in the amount of \$685.20, at no time did this Court enter a
4 “money” judgment against plaintiff for the \$87,450.00. If plaintiff wanted a money judgment from the
5 bankruptcy court for the amount of the Texas judgment, she could have requested and obtained this
6 relief. Instead, plaintiff requested and obtained a declaration that the Texas judgment is
7 nondischargeable, nothing more! The Adversary Judgment is unambiguous and plaintiff is seeking to
8 extract additional relief that was not conferred on her by the Adversary Judgment. Accordingly,
9 plaintiff’s renewal of judgment must be vacated.¹

10 Mr. Haden anticipates that plaintiff will argue that the bankruptcy court is the
11 appropriate forum to renew the judgment and will cite *McCowan v. Fraley*, 296 B.R. 1 (9th Cir. 2003)
12 for the proposition the bankruptcy court continues to have jurisdiction following a nondischargeability
13 proceeding. While Mr. Haden does not dispute that this Court continues to have jurisdiction over
14 certain aspects of the Adversary Judgment, the *McCowan* case has only limited application.

15 There, the bankruptcy court determined that the debtor’s obligation to the creditor was
16 nondischargeable and entered a money judgment for \$22,182.87. After the case was closed, the
17 creditor moved to enforce the judgment. When the debtor sought to claim an exemption in a certain
18 bank account and receivable, the creditor objected and moved to have the bankruptcy court determine
19 the validity of the exemption. The debtor argued that when the bankruptcy case was closed, the
20 bankruptcy court lost jurisdiction to enforce the money judgment because enforcement proceedings
21 were not “related to” the bankruptcy case. The bankruptcy court ruled that it retained jurisdiction to
22 enforce its own money judgments even after a bankruptcy case is closed. The Ninth Circuit
23 Bankruptcy Appellate Panel agreed and affirmed the bankruptcy court’s decision on appeal. *Id.* at 11.

24 In reaching its decision, the BAP took adopted following approach:

25 A bankruptcy court has jurisdiction to determine the dischargeability of a
26 debt owed by a bankruptcy debtor; such a proceeding “arises under” the
27

28 ¹ At the very least, plaintiff should have filed her application for renewal of judgment where the Texas judgment was first certified in California—the United States District Court for the Northern District of California. However, as argued in this memorandum, her application if filed would fail as well.

1 Bankruptcy Code, because it is a cause of action created by § 523 of the
 2 Bankruptcy Code, *In re Menk*, 241 B.R. 896, 904 (9th Cir. BAP 1999) and
 3 is a “core” proceeding that the bankruptcy court may hear and determine.
 4 28 U.S.C. § 157(b)(1), (b)(2)(I). The court’s jurisdiction to determine the
 5 dischargeability of a debt carries with it the jurisdiction to enter a money
 6 judgment that fixes the amount of the nondischargeable debt. *In re*
 7 *Kennedy*, 108 F.3d (9th Cir. 1997).

8 It has been long settled that process in aid of and to effectuate an
 9 adjudication and order entered by a federal court may be enforced by that
 10 court “irrespective of whether the court would have jurisdiction if the
 11 proceeding were an original one” and that these principles apply in
 12 bankruptcy. (citations omitted)

13 * * *

14 Actions “brought in aid of an execution or to effectuate a judgment
 15 entered in the prior suit” are ancillary to the original action, *In re Lawson*,
 16 156 B.R. 43, 46 (9th Cir. BAP 1993); “they are in effect a continuance of
 17 the original suit.” *Jones v. National Bank of Commerce of El Dorado*, 157
 18 F.2d 214, 215 (8th Cir. 1946) (relied on by *Lawson*). Thus, where a
 19 proceeding is brought to execute on a judgment entered by the bankruptcy
 20 court, the proceeding is a continuation of the original proceeding, and
 21 jurisdiction depends on whether the original proceeding was within the
 22 bankruptcy court’s jurisdiction. *See In re Mayex II Corp.*, 178 B.R. 464,
 23 468 (Bankr. W.D. Mo. 1995) (orders in aid of execution of judgment in
 24 core proceeding fall within court’s ancillary jurisdiction). *Accord Peacock*,
 25 516 U.S. at 355.

26 In this case, the original proceeding was one to determine the
 27 dischargeability of a debt, which is a proceeding “arising under” the
 28 Bankruptcy Code. Such a proceeding is without question within the
 jurisdiction of the bankruptcy court, as was the money judgment entered
 on the debt. Therefore, a proceeding to enforce the resulting judgment or
 execute on it continues to be a matter that “arises under” the Bankruptcy
 Code, until the judgment is satisfied. *Id.* 4 – 8.

29 In applying *McCowan* case to this matter at hand, it must be noted that *McCowan* has
 30 only limited applicability. Mr. Haden does not dispute that this Court retains jurisdiction to enforce its
 31 orders and judgments. This retention, however, is only limited to enforcement of that Adversary
 32 Judgment entered on April 28, 1996. Like *McCowan*, this Court entered a money judgment for a
 33 specified dollar amount, \$685.20. Plaintiff’s attempt to “tack on” an additional \$434,673.51 to the
 34 Adversary Judgment is inappropriate, not to mention outside the jurisdiction of this Court, and not
 35 supported by the principals of *McCowan*. Accordingly, plaintiff’s renewal of judgment must be
 36 vacated.

**B. PLAINTIFF'S RENEWAL OF JUDGMENT IS TIME BARRED
BECAUSE SHE FAILED TO RENEW HER JUDGMENT WITHIN THE
10-YEAR STATUTE OF LIMITATIONS AS PRESCRIBED BY CODE
OF CIVIL PROCEDURE SECTION 683.020.**

Even if the Court were to conclude that it has jurisdiction to enter plaintiff's renewal of judgment, said renewal must nonetheless be ordered vacated because plaintiff failed to renew her judgment within the 10-year statute of limitations as prescribed by Code of Civil Procedure section 683.020. More specifically, plaintiff's failure to renew her judgment within ten years of the date she registered her judgment with the United States District Court for the Northern District of California (August 20, 1996) makes her judgment unenforceable in California.

Section 1963 of Title 28, among other things, provides that

§ 1963. Registration of judgments for enforcement in other districts

A judgment in an action for the recovery of money or property entered in any court of appeals, district court, bankruptcy court, or in the Court of International Trade may be registered by filing a certified copy of the judgment in any other district or, with respect to the Court of International Trade, in any judicial district, when the judgment has become final by appeal or expiration of the time for appeal or when ordered by the court that entered the judgment for good cause shown. 28 U.S.C. § 1963

In California, a judgment may not be enforced upon the expiration of 10 years after the date of entry of a money judgment. *Code Civ. Proc. § 683.020*.

The Ninth Circuit has addressed how the federal statute for registration of judgment from other districts interacts with a counterpart California statute and with the California statute of limitations (Code of Civil Procedure § 683.020 (formerly § 681)). In the case of *Marx v. Go Publishing Company*, 721 F.2d 1272 (9th Cir. 1983), the Ninth Circuit ruled on the issue of whether a registration under 28 U.S.C. section 1963 creates a "new judgment" for statute of limitations purposes, giving the judgment creditor ten years from the date of registration in which to satisfy the judgments.

In that case, Marx obtained judgment against Go Publishing in 1971 in the United States District Court for the District of Columbia. The judgment was not paid. In 1980 Marx registered the judgment in the United States District Court for the Central District of California, pursuant to 28 U.S.C. section 1963. In 1982 Marx commenced proceedings in the District Court for the Central District of California to enforce the judgment. Go Publishing argued a statute of limitations defense

1 under Code of Civil Procedure section 681.² The district court rejected this defense. Go Publishing
 2 appealed and lost. In affirming the district court's ruling, the Ninth Circuit made the following
 3 analysis:

4 The California period of limitations for enforcement of judgments is ten
 5 years. *See Cal. Code Civ. Proc. § 681*. Go Publishing invoked the statute
 6 as a bar to the proceedings. The issue is whether registration under 28
 7 U.S.C. § 1963 creates a new judgment for statute of limitations purposes,
 8 giving the judgment-creditor ten years from the date of registration in
 9 which to satisfy the judgment. Under analogous California law, the ten
 10 year period for a valid and enforceable judgment of a sister state runs
 11 anew from the time of its filing in the state superior court, provided that at
 12 the time of registration the judgment is not then time barred and other
 13 requisites of the statute are fulfilled. [citations omitted] Go Publishing
 14 argues, however, that this state rule is inapplicable where a district court
 15 judgment is registered under the federal statute. We disagree.

16 The California statute provides for registration of judgments of sister
 17 states, and the provisions of 28 U.S.C. § 1963 are its federal analogue. We
 18 discern no reason why the statute of limitations rule of the state should not
 19 apply to the federal proceeding. The registration of the district court
 20 judgment under 28 U.S.C. § 1963, the judgment not then being time
 21 barred, *Cal. Code Civ. Proc. § 337.5*, commenced anew the running of the
 22 applicable statute, which is *Cal. Code Civ. Proc. § 681*. Id. at 1273.

23 In applying the *Marx* analysis to the present case, it is clear that plaintiff's renewal was
 24 filed too late. Plaintiff registered her Texas judgment with the District Court for the Northern District
 25 of California on **August 20, 1996**. Since the California period of limitations for enforcement of
 26 judgment under Code of Civil Procedure section 683.020 is ten years, plaintiff had, under *Marx*, until
 27 **August 20, 2006** to file her renewal of judgment. It is undisputed that plaintiff failed to do so since her
 28 renewal of judgment was filed on **November 8, 2007, well over a year after the statute had run!**
 Based on the foregoing, and the principals set forth in *Marx*, plaintiff's renewal of judgment is time
 barred and must be vacated.

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² The current statute now is Code of Civil Procedure section 683.020.

CONCLUSION

For the reasons set forth above, Mr. Haden respectfully requests that this Court issue its order vacating plaintiff's renewal of judgment filed November 8, 2007.

DATED: December 14, 2007.

BARTLETT, LEADER-PICONE & YOUNG, LLP

BY: /s/ Kaipo K.B. Young #164718

KAIPO K.B. YOUNG

Attorneys for Defendant and Judgment Debtor

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 IRETA IRBY

UNITED STATES BANKRUPTCY COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SANTA ROSA DIVISION

In re	)	Chapter 7
	)	Underlying Case No. 96-13933 AJ
BROOKS H. HADEN,)	
Debtor,)	
_____)	
IRETA IRBY,	)	Adversary Proceeding No. 97-1034-AJ
Plaintiff,)	
vs.	)	NOTICE OF WITHDRAWAL OF
	)	MOTION TO AMEND JUDGMENT
BROOKS H. HADEN,	)	PURSUANT TO BANKRUPTCY
Defendant.	)	PROCEDURE RULE 9024 AND FRCP
_____	)	60(a) and (b)(6)
	)	Date: January 25, 2008
	)	Time: 10:00 a.m.
	)	Dept: U.S. Bankruptcy Court
	)	99 South "E" Street
	)	Santa Rosa, CA 95404

The Honorable Alan Jarolovsky

Based on the attached notice from the Court, Plaintiff and Judgment Creditor Ireta Irby ("Irby") hereby withdraws her Motion To Amend Judgment Pursuant To Bankruptcy Rule 9024 and Federal Rule of Civil Procedure 60(a) and (b)(6).

///

///

Exhibit E

10281/0001/654783.1		NOTICE TO WITHDRAW MOTION TO AMEND JUDGMENT...Irby v. Haden, #97-1034 AJ
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1 DATED: January 11, 2008

2 SEVERSON & WERSON
3 A Professional Corporation

4
5 By: /s/ Rhonda L. Nelson
6 Rhonda L. Nelson

7 Attorneys for Plaintiff and Judgment Creditor
8 IRETA IRBY
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10281/0001/654783.1	- 2 -	NOTICE TO WITHDRAW MOTION TO AMEND JUDGMENT... <i>Irby v. Haden</i> , #97-1034 AJ
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ATTACHMENT

ATTACHMENT

Rhonda L. Nelson

From: BKECF_CANB@canb.uscourts.gov
Sent: Thursday, December 27, 2007 11:09 AM
To: Rhonda L. Nelson
Cc: kyoung@bl-plaw.com
Subject: Defective Order 97-01034-104696.pdf

**U.S. Bankruptcy Court
Northern District of California**

The order submitted to the Court on 12/21/2007 will not be processed due to the following deficiencies:

OK, there is no mistake here. There is a recent circuit case (not at my fingertips, sorry, but you can find it) noting that when there is a prior state court judgment the bankruptcy court can EITHER enter a new money judgment or just declare the state court judgment nondischargeable. The distinction becomes important when it is time to renew the judgment. Since the original form of the judgment is not a mistake, you should bring a noticed motion if you want it changed. (Alan Jaroslovsky on 12/27/2007)

Order Type: Notice of Hearing

Case Name: Irby v. Haden

Order: 97-01034-104696.pdf

Date Submitted: 12/21/2007

Entered on Docket

January 22, 2008

GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



BARTLETT, LEADER-PICONE & YOUNG, LLP
MALCOLM LEADER-PICONE (STATE BAR NO. 104626)
KAIPO K.B. YOUNG (STATE BAR NO. 164718)
2201 BROADWAY, SUITE 803
OAKLAND, CA 94612
TELEPHONE: (510) 444-2404
FACSIMILE: (510) 444-1291

Signed: January 18, 2008


ALAN JAROSLOVSKY
U.S. Bankruptcy Judge

Attorneys for Defendant and Judgment Debtor
BROOKS H. HADEN

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SANTA ROSA DIVISION

In re
BROOKS H. HADEN,
Debtor.

Case No. 96-13933 AJ

Chapter 7

Adv. Proc. No. 97-1034 AJ

IRETA IRBY,
Plaintiff,

**ORDER VACATING JUDGMENT
CREDITOR'S RENEWAL OF JUDGMENT.**

v.

BROOKS H. HADEN,
Defendant.

Date: January 25, 2008

Time: 10:00 a.m.

Dept.: U.S. Bankruptcy Court
99 South "E" Street
Santa Rosa, CA 95404

Honorable Alan Jaroslovsky

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Exhibit F

ORDER VACATING RENEWAL OF JUDGMENT

Adv. Proc. No. 97-1034 AJ

Case: 97-01034

Doc #: 68

Filed: 01/18/2008

Page 1 of 2

ORDER

In response to defendant Brook H. Haden's motion for order vacating judgment creditor's renewal of judgment, creditor Ireta Irby conceded that it was not necessary for her to renew the Nondischargeability Judgment in this Adversary Proceeding. Therefore, for good cause appearing:

IT IS ORDERED that defendant's motion for order vacating judgment creditor's renewal of judgment is hereby GRANTED.

IT IS FURTHER ORDERED that plaintiff's renewal of judgment filed November 8, 2007 is hereby vacated and is of no further force and effect; without prejudice to plaintiff's rights to enforce the federal judgment to the extent permitted by law.

* * * **END OF ORDER** * * *

Approved as to form:
SEVERSON & WERSON

BY: /s/ Rhonda L. Nelson
RHONDA L. NELSON
Attorneys for Plaintiff
IRETA IRBY

RHONDA L. NELSON (State Bar No. 116043)
 DAVID E. PINCH (State Bar No. 124851)
 SEVERSON & WERSON, P.C.
 One Embarcadero Center, Suite 2600
 San Francisco, CA 94111
 Telephone: (415) 677-5536
 Facsimile: (415) 677-5664
 e-mail: rln@severson.com

Attorneys for Movant
 IRETA IRBY

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SANTA ROSA DIVISION

In re	)	Chapter 7
BROOKS H. HADEN,	)	Underlying Case No. 96-13933 AJ
)	
Debtor,	)	Adversary Proceeding No. 97-1034-AJ
)	
IRETA IRBY,	)	Date: To be determined
	)	Time:
Plaintiff,	)	Judge: Hon. Alan J. Jaraslovsky
	)	Place: U.S. Bankruptcy Court
vs.	)	99 South "E" Street
	)	Santa Rosa, CA 95404
BROOKS H. HADEN,)	
)	
Defendant.)	

**EX PARTE APPLICATION FOR ORDER SHORTENING TIME FOR HEARING ON
 IRETA IRBY'S MOTION TO AMEND JUDGMENT**

To the Honorable Alan J. Jaraslovsky:

Judgment Creditor, IRETA IRBY (hereinafter "Movant") hereby respectfully requests an Order from this Court granting her application to have a Motion to Amend Judgment Pursuant to Bankruptcy Procedure Rule 9024 and FRCP 60(b)(6). This request is made under B.L.R. 9006-1.

The factual allegations herein are supported by the accompanying Declaration of David E. Pinch in support of this application and the Declaration of Rhonda L. Nelson in Support of Motion for to Amend Judgment. Movant seeks to amend a judgment for non-dischargeability that will expire under law on April 27, 2008. Movant must amend the judgment under FRCP 60(b) so

1 that it may be renewed and enforced as to a specific dollar amount, but she has only until April
2 27, 2008, to renew the judgment under California Code of Civil Procedure Sections 683.110 *et*
3 *seq.* There is insufficient time to have this motion heard on regular notice as the date set for the
4 expiration of this judgment is less than the 28 days notice period require B.L.R. 7007-1(a).

5 By granting Movant's application for shortened notice, the Court will be able to rule upon
6 Movant's motion before the judgment expires.

7 Judgment Debtor, Brooks H. Haden, has not satisfied the judgment and is now known to
8 have a well-paid position at Mechanic's Bank. No amount of the judgment has been paid.

9 WHEREFORE, Movant prays that this Court grant the proposed Order Shortening Time
10 accompanying this Application so that Movant's Motion for Relief from Stay may be heard
11 before April 27, 2008.

12 DATED: April 1, 2008

13 SEVERSON & WERSON, P.C.

14
15 By: /s/ Rhonda L. Nelson; 116043
Rhonda L. Nelson
David E. Pinch

16
17 Attorneys for Judgment Creditor, IRETA IRBY
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BARTLETT & LEADER-PICONE, LLP
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Attorneys for Defendant and Judgment Debtor
BROOKS H. HADEN

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SANTA ROSA DIVISION

In re
BROOKS H. HADEN,
Debtor.

IRETA IRBY,
Plaintiff,

v.

BROOKS H. HADEN,
Defendant.

Case No. 96-13933 AJ

Chapter 7

Adv. Proc. No. 97-1034 AJ

**DEBTOR'S OPPOSITION TO CREDITOR'S
EX PARTE APPLICATION FOR AN ORDER
SHORTENING TIME FOR A MOTION TO
AMEND JUDGMENT.**

Date: tba
Time: tba
Dept.: U.S. Bankruptcy Court
99 South "E" Street
Santa Rosa, CA 95404

Honorable Alan Jaroslovsky

I. PRELIMINARY STATEMENT.

On December 26, 2007, plaintiff/creditor Ireta Irby filed a motion to amend the declaratory non-dischargeability judgment in this case. On January 11, 2008, after receiving the debtor's opposition to the motion, plaintiff withdrew her motion. See, Exhibit "A" hereto. Plaintiff also stipulated to vacate the renewal of the adversary judgment after receiving the debtor's motion to vacate it. See, Exhibit "B" hereto.

OPPOSITION TO ORDER SHORTENING TIME

Adv. Proc. No. 97-1034 AJ

Now, not only has plaintiff changed her mind and re-filed her motion to amend the judgment, but she asks that it be heard on shortened time because her time to renew the judgment is running out before the motion would otherwise be heard. The debtor opposes the motion and opposes having the motion heard on shortened time. There is no reason to expedite this matter, since plaintiff voluntarily withdrew the same motion, and vacated a renewal of the judgment, and created for herself any perceived need to expedite the hearing.

On top of that, the application for the order shortening time fails to comply with Bankruptcy Local Rule 9006-1 because it fails to inform the Court that the same motion was previously on calendar and was voluntarily dropped by the plaintiff, and failed to consult with debtor's counsel prior to filing the application.

Consequently, the debtor requests that the Court deny the application for an order shortening time.

II. ARGUMENT.

Bankruptcy Local Rule 9006-1 provides in pertinent part:

(c) Requests for Changing time. Any request to enlarge or shorten time may be made by stipulation or motion. Absent exigent circumstances, any motion shall be heard on at least 72 hours notice to the respondent. Any request, whether made by stipulation or motion, shall be accompanied by a declaration stating:

- (1) The reason for the particular enlargement or shortening of time requested;
- (2) Previous time modifications related to the subject of the request, whether by stipulation or Court order;
- (3) The effect of the requested time modification on the schedule for the case or proceeding; and
- (4) Where the request is not made by stipulation, the efforts made to speak with the respondent and, if the movant has spoken with the respondent, the reasons given for any refusal to agree to the request.

In this case, plaintiff violated Bankruptcy Local Rule 9006-1, subpart (c)(2) by failing to notify the Court in the application for the order shortening time that this matter was previously on calendar on a normal hearing and briefing schedule, and it was voluntarily withdrawn by the plaintiff after receiving the opposition. That is certainly pertinent information falling within the requirement that the application state "[p]revious time modifications related to the subject of the request." It was also required under that subsection that the Court be informed that plaintiff stipulated to the vacating of the renewal of the judgment.

\\BL-PSERVER2\BL-P FILES\CLIENT FILES\G TO I\HADEN, BIRBY\MOTIONS\AMEND JUDGMENT\2ND ATTEMPT\OPP OST RE MTN AMEND 040208 MLP.DOC4/2/08

Both of plaintiff's actions, vacating the renewal and withdrawing the prior motion to amend, are pertinent to this request for an order shortening time, because it is unfair to both the Court and to the debtor to be put to the extra trouble and expense of an expedited motion to amend, when they went through that fire drill one time before. Just because plaintiff is apparently panicked, that the District Court might find that her end-run around the expiration of her judgment in the District Court was improper, leaving plaintiff without a judgment to enforce, does not justify expediting this motion. Plaintiff should be bound by her implicit concession that the adversary judgment is not subject to amendment nor is the judgment appropriately renewed.

III. STATEMENT OF FACTS.

These are the facts taken from the Declaration of Ms. Nelson and the documents on file in this adversary proceeding and in the District Court, Case No. 08-80004.

1. On November 17, 1988, plaintiff Ireta Irby obtained a default money judgment against defendant Brooks H. Haden for the sum of \$87,450.00 in the United States District Court for the Southern District of Texas, Houston Division, Case No. H-88-1781 ("Texas Judgment").

2. On August 20, 1996, plaintiff caused the Texas Judgment to be registered with the United States District Court for the Northern District of California, San Francisco Division, Case No. 3:96-fj-00034-VRW.

3. On November 14, 1996 Mr. Haden filed a voluntary petition under chapter 7 of the Bankruptcy Code, Case No. 96-13933, in the United States Bankruptcy Court for the Northern District of California, Santa Rosa Division.

4. Thereafter, on February 13, 1997, plaintiff filed her nondischargeability complaint against Mr. Haden, Adv. Proc. No. 97-01034 ("Adversary Proceeding").

5. On April 14, 1998, a trial was held in the Adversary Proceeding. Following the trial, the Court, on April 28, 1998, entered a judgment in favor of plaintiff and against Mr. Haden ("Adversary Judgment"). The Adversary Judgment specifically states as follows:

After hearing the evidence and arguments of counsel, judgment is hereby entered in this action against debtor and defendant Brooks H. Haden ("Haden") in favor of plaintiff Ireta Irby ("Irby") **determining that Irby's Judgment**

(c) **Requests for Changing time.** Any request to enlarge or shorten time may be made by stipulation or motion. Absent exigent circumstances, any motion shall be heard on at least 72 hours notice to the respondent. Any request, whether made by stipulation or motion, shall be accompanied by a declaration stating:

- (1) The reason for the particular enlargement or shortening of time requested;
- (2) Previous time modifications related to the subject of the request, whether by stipulation or Court order;
- (3) The effect of the requested time modification on the schedule for the case or proceeding; and
- (4) Where the request is not made by stipulation, the efforts made to speak with the respondent and, if the movant has spoken with the respondent, the reasons given for any refusal to agree to the request.

In this case, plaintiff violated Bankruptcy Local Rule 9006-1, subpart (c)(2) by failing to notify the Court in the application for the order shortening time that this matter was previously on calendar on a normal hearing and briefing schedule, and it was voluntarily withdrawn by the plaintiff after receiving the opposition. That is certainly pertinent information falling within the requirement that the application state "[p]revious time modifications related to the subject of the request." It was also required under that subsection that the Court be informed that plaintiff stipulated to the vacating of the renewal of the judgment.

Both of plaintiff's actions, vacating the renewal and withdrawing the prior motion to amend, are pertinent to this request for an order shortening time, because it is unfair to both the Court and to the debtor to be put to the extra trouble and expense of an expedited motion to amend, when they went through that fire drill one time before. Just because plaintiff is apparently panicked, that the District Court might find that her end-run around the expiration of her judgment in the District Court was improper, leaving plaintiff without a judgment to enforce, does not justify expediting this motion. Plaintiff should be bound by her implicit concession that the adversary judgment is not subject to amendment nor is the judgment appropriately renewed.

B. THERE IS NO EXIGENCY TO JUSTIFY AN EXPEDITED HEARING, OTHER THAN THAT OF THE PLAINTIFF'S OWN MAKING.

Although requests for orders shortening time are routinely granted, this is one instance where the request should be denied. Plaintiff has once before filed the same motion to amend and put the Court to the trouble of reviewing the motion, and the debtor to the cost and trouble of researching and filing an opposition. It can be inferred from the withdrawal of the motion one day after service of the opposition, that

1 plaintiff found the opposition to be compelling. Why else drop the motion rather than have it heard?

2 So, when the plaintiff now wants to not only have the Court hear the motion to amend
3 because her purported judgment in the District Court is under attack, but wants to have it heard on an
4 expedited basis, the Court should say "no, you had your chance to have your motion heard, and it is your fault
5 and your fault alone that it was not heard in an orderly and timely fashion prior to the expiration of the
6 adversary judgment".

7 In twenty-five years of practice, debtor's counsel cannot recall another situation in which an
8 opponent has dropped the hearing on a motion set on ordinary time only to come back several months later
9 and beg to have the same motion heard on shortened time because the party is up against a statutory deadline.
10 Obviously, plaintiff's counsel is in a panic because she failed to timely renew the District Court money
11 judgment prior to August 20, 2006. Since the debtor's counsel pointed that out to her in their motion to
12 vacate the renewal of the judgment in this Court last November, plaintiff's counsel has been zigging and
13 zagging back and forth between this Court and the District Court desperately trying to find a way to salvage a
14 money judgment that expired a year and a half ago.

15 V. CONCLUSION.

16 For the reasons set forth above, plaintiff is not entitled to expedited consideration of her
17 motion to amend the judgment.

18 DATED: April 2, 2008.

BARTLETT, LEADER-PICONE & YOUNG, LLP

20 BY: /s/ Malcolm Leader-Picone #104620
MALCOLM LEADER-PICONE
21 Attorneys for Defendant and Judgment Debtor
BROOKS H. HADEN
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23
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PROOF OF SERVICE BY MAIL

I, Malcolm Leader-Picone, declare that:

I am employed in the County of Alameda, California. I am over the age of eighteen years and not a party to the within action. My business address is 2201 Broadway, Suite 803, Oakland, CA 94613.

On April 2, 2008, I served the following document(s) entitled:

**DEBTOR'S OPPOSITION TO CREDITOR'S *EX PARTE* APPLICATION FOR AN ORDER
SHORTENING TIME FOR A MOTION TO AMEND JUDGMENT**

upon the following person(s) in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Oakland, California addressed as follows, and by email to the designated address:

Rhonda I. Nelson, Esq. Severson & Werson A Professional Corporation One Embarcadero Center, Suite 2600 San Francisco, CA 94111 Telephone: 415-398-3344 Facsimile: 415-956-0439 Email: rln@severson.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Oakland, California, on April 2, 2008.

/s/ Malcolm Leader-Picone

Malcolm Leader-Picone

RHONDA L. NELSON (State Bar No. 116043)
 DAVID E. PINCH (State Bar No. 124851)
 SEVERSON & WERSON
 A Professional Corporation
 One Embarcadero Center, Suite 2600
 San Francisco, CA 94111
 Telephone: (415) 398-3344
 Facsimile: (415) 956-0439
 Attorneys for Plaintiff and Judgment Creditor
 IRETA IRBY

UNITED STATES BANKRUPTCY COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SANTA ROSA DIVISION

In re	)	Chapter 7
BROOKS H. HADEN,	)	Underlying Case No. 96-13933 AJ
Debtor,)	
_____)	
IRETA IRBY,	)	Adversary Proceeding No. 97-1034-AJ
Plaintiff,)	
vs.	)	MEMORANDUM OF POINTS AND
BROOKS H. HADEN,	)	AUTHORITIES IN SUPPORT OF
Defendant.	)	MOTION TO AMEND JUDGMENT
	)	PURSUANT TO BANKRUPTCY
	)	PROCEDURE RULE 9024 AND FRCP
	)	60(b)(6)

Date:
 Time:
 Dept: U.S. Bankruptcy Court
 99 South "E" Street
 Santa Rosa, CA 95404

The Honorable Alan Jarolovsky

Ireta Irby ("Irby") respectfully submits the following Memorandum of Points and
 Authorities in Support of Motion to Amend Judgment Pursuant to Bankruptcy Procedure Rule
 9024 and Federal Rule of Civil Procedure 60(b)(6).

10281/0001/652696.2		P&As IN SUPPORT OF MOTION TO AMEND JUDGMENT...
		<i>Irby v. Haden</i> - #97-1034 AJ

I

BACKGROUND

On November 21, 1988, a judgment was entered in favor of Irby and against Brooks Haden ("Haden") in the United States District Court for the Southern District of Texas in the amount of \$87,450.00 ("the Texas Judgment") (Declaration of Rhonda L. Nelson ("Nelson Decl."), para. 2, Exh. A).

On April 27, 1998, the Court entered a Judgment in favor of Irby and against Haden determining that the Texas Judgment was nondischargeable pursuant to Bankruptcy Code § 523(a)(2)(A) ("Nondischargeability Judgment"). The Nondischargeability Judgment provides:

After hearing the evidence and arguments of counsel, judgment is hereby entered in this action against debtor and defendant Brooks H. Haden ("Haden") in favor of plaintiff Ireta Irby ("Irby") determining that Irby's Judgment against Haden, entered on November 17, 1988, in the United States District Court for the Southern District of Texas, Civil Action No. H-88-1781, is deemed nondischargeable pursuant to Bankruptcy Code Section 523(a)(2)(A). Irby shall recover her costs of suit in the amount of \$685.20.
(Nelson Decl., para. 3 Exh. B).

As a result of counsel's error, the amount of the Texas Judgment was not included in the Nondischargeability Judgment although the Texas Judgment was *specifically referenced* in the Nondischargeability Judgment.

On February 2, 1999, in connection with submission of the Abstract, Irby filed the Amended and Corrected Declaration of Rhonda L. Nelson Regarding Post Judgment Interest pursuant to 28 USC § 1961 ("Post-Judgment Declaration") (Nelson Decl., para. 4; Exh. C.) The Post-Judgment Declaration provided the amount of the Texas Judgment and calculated the amount of the interest that had accrued on the Texas Judgment since 1988. The Post-Judgment Declaration further provided that "[t]he Nondischargeability Judgment determines that a judgment originally entered on November 17, 1988 in the United States District Court for the Southern District of Texas in the amount of \$87,450.00 (the "Judgment") is nondischargeable pursuant to Bankruptcy Code § 523(a)(2)(A). The Post-Judgment Declaration was served on Haden's

10281/0001/652696.2

- 2 -

P&As IN SUPPORT OF MOTION TO AMEND
JUDGMENT...

Irby v. Haden - #97-1034 AJ

1 counsel. At no time did Haden's counsel object to the characterization of the Nondischargeability
2 Judgment as a money judgment by including the amount of the Texas Judgment in it.

3 The Abstract which was issued by the Clerk of the Bankruptcy Court on February 24,
4 1999. (Nelson Decl., para. 5; Exh. D.) The Abstract provides that a money judgment was entered
5 by the Bankruptcy Court in the amount of \$87,450.00, the amount of the Texas Judgment, and
6 includes the interest accrual provided in the Post-Judgment Declaration. It appears that the Clerk
7 of the Court also treated the Nondischargeability Judgment as a money judgment despite the
8 absence of a specific judgment amount in the Nondischargeability Judgment. The Abstract was
9 subsequently recorded in ten counties in California (Nelson Decl., para 6; Exh. E.)

10 In December 2007, Irby filed a motion to amend the Nondischargeability Judgment under
11 FRCP 60(b)(a) and (b)(6) on the ground that the failure to include the amount of the judgment
12 was a scrivener's error. The Court responded, prior the hearing date, that the failure to include the
13 amount of the judgment was not a mistake and that if Irby wanted to change it, she should bring a
14 noticed motion (Nelson Decl., para. 7; Exh. F). Since Irby's federal Texas Judgment was still
15 valid in the Texas District Court, rather than bring a noticed motion, Irby certified the federal
16 Texas Judgment and filed a Certification of Judgment for Registration in Another District in the
17 Northern District of California on January 10, 2008 (Nelson Decl., para. 8, Exh. G). She then
18 proceeded to exercise her enforcement actions against Haden by attempting to garnish his wages
19 (Nelson Decl., para. 9. Exh. H).

20 On Friday, March 28, 2008, Haden filed an application for temporary restraining order to
21 enjoin Irby from garnishing Haden's wages and to vacate the January 11, 2008 registration of
22 foreign judgment. A hearing was held on Monday, March 31, 2008. Haden argued that although
23 the Texas Judgment is still valid, Irby should have been prohibited from re-registering the Texas
24 Judgment in 2008 (although she revived the judgment pursuant to Texas state law in 1998 ---
25 otherwise it would have gone dormant pursuant to operation of law) and that Irby should have
26 renewed the Texas Judgment which was originally registered in the Northern District on August
27

10281/0001/652696.2

- 3 -

P&As IN SUPPORT OF MOTION TO AMEND
JUDGMENT...
Irby v. Haden - #97-1034 AJ

20, 1996, prior to the filing of Haden's bankruptcy case, before the expiration of the ten year period pursuant to California Code of Civil Procedure section 683.020 (Nelson Decl., para. 10-12, Exh. I-K).

Although the Court denied Haden's Application for TRO, the Court set a hearing on the application for permanent injunction for May 14, 2008, at 9:00 a.m. (Nelson Decl., para. 13, Exh. L). Accordingly, in an abundance of caution, Irby comes back to this Court to ask that it amend the Nondischargeability Judgment to convert it into a money judgment so that she may renew the Nondischargeability Judgment before the ten years expire at the end of April 2008. She does not want to run the risk that Judge Hamilton will rule against her at the hearing on May 14, 2008 and she will have lost her ability to enforce her Texas Judgment against Haden in California. Irby also does not have the luxury of waiting until after the May 14 hearing since the ten years runs on the Nondischargeability Judgment on April 28, 2008.

Based on the foregoing, in the interests of justice, Irby requests that this Court amend the Nondischargeability Judgment to specifically provide as follows:

After hearing the evidence and arguments of counsel, judgment is hereby entered in this action against debtor and defendant Brooks H. Haden ("Haden") in favor of plaintiff Ireta Irby ("Irby") determining that Irby's Judgment against Haden **in the amount of \$7,450.00**, entered on November 17, 1988, in the United States District Court for the Southern District of Texas, Civil Action No. H-88-1781, is deemed nondischargeable pursuant to Bankruptcy Code Section 523(a)(2)(A). Irby shall recover her costs of suit in the amount of \$685.20.

A copy of the Proposed Amended Judgment is attached.

II

COURT HAS JURISDICTION TO AMEND JUDGMENT

The Court has jurisdiction to grant the relief requested under Bankruptcy Procedure Rule 9024 and Federal Rules of Civil Procedure 60(b)(6).

Rule 60(b)(6) provides:

"On motion and just terms, the court may relieve a party of its legal representative from a final judgment, or proceeding for the following reasons:

10281/0001/652696.2	- 4 -	P&As IN SUPPORT OF MOTION TO AMEND JUDGMENT... <i>Irby v. Haden</i> - #97-1034 AJ
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1 (6) any other reason that justifies relief:

2 The amount of the Texas Judgment was always readily ascertainable and undisputable.
 3 Irby's counsel admittedly failed to include the specific amount of the Texas Judgment in the
 4 Nondischargeability Judgment , although it is incorporated in the judgment by reference to the
 5 Texas Judgment. The Post-Judgment Declaration, which was subsequently filed, made specific
 6 reference to the amount of the Texas Judgment as if the amount of the judgment had been
 7 included in the Nondischargeability Judgment without any objection from Haden or his counsel.
 8 As a result, it is appropriate to relieve Irby of the effect of the current form of the
 9 Nondischargeability Judgment and amend the judgment to include the amount of the Texas
 10 Judgment to make clear that the Nondischargeability Judgment is a money judgment.

11 III

12 THE MOTION IS TIMELY

13 Although this motion to amend the Nondischargeability Judgment is being brought more
 14 than 9 years after it was entered, it is nevertheless timely.

15 Federal Rule of Civil Procedure 60(b)(6) only requires that the motion be brought on a
 16 timely basis. The one year limitations period only relates to motions brought pursuant to Rule
 17 60(b)(1), (2), and (3).

18 This motion is brought within one day after Judge Hamilton set the motion for preliminary
 19 injunction on May 14, 2008. Accordingly, this motion is timely and brought without substantial
 20 delay.

21 22 23 24 25 26 27 28	10281/0001/652696.2	- 5 -	P&As IN SUPPORT OF MOTION TO AMEND JUDGMENT... <i>Irby v. Haden</i> - #97-1034 AJ
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IV

CONCLUSION

For the foregoing reasons, Irby requests that the Court grant the foregoing motion to include the amount of the Texas Judgment in the Nondischargeability Judgment.

DATED: April 1, 2008

SEVERSON & WERSON
A Professional Corporation

By: /s/ Rhonda L. Nelson
Rhonda L. Nelson
Attorneys for Plaintiff and Judgment Creditor
IRETA IRBY

10281/0001/652696.2

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P&As IN SUPPORT OF MOTION TO AMEND
JUDGMENT...
Irby v. Haden - #97-1034 AJ

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KAIPO K.B. YOUNG (State Bar No. 164718)
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OAKLAND, CA 94612
TELEPHONE: (510) 444-2404
FACSIMILE: (510) 444-1291

Attorneys for Defendant
BROOKS H. HADEN

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SANTA ROSA DIVISION

In re
BROOKS H. HADEN,
Debtor.

IRETA IRBY,
Plaintiff,

v.

BROOKS H. HADEN,
Defendant.

Case No. 96-13933 AJ

Chapter 7

Adv. Proc. No. 97-1034 AJ

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S SECOND MOTION TO
AMEND JUDGMENT.**

Date: January 25, 2008

Time: 10:00 a.m.

Dept.: U.S. Bankruptcy Court
99 South "E" Street
Santa Rosa, CA 95404

Honorable Alan Jaroslovsky

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\\BL-PSERVER2\BL-P FILES\CLIENT FILES\G TO IHADEN, BURBY\MOTIONS\AMEND JUDGMENT\IST ATTEMPT\OPP MTN AMEND 040808 MLP.DOC4/9/08

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1
2
3 **I. PRELIMINARY STATEMENT.**

4 Plaintiff has moved the Court, for the second time, seeking to amend the bankruptcy court
5 declaratory judgment to include the amount of the underlying money judgment, claiming some sort of
6 unarticulated error of counsel, because defendant has presented some very compelling arguments to the
7 District Court to the effect that the District Court judgment entered on August 20, 1996 was never renewed,
8 has expired, and cannot be revived. However, the judgment from this Court, entered ten years ago, and
9 affirmed on appeal, contains no error. Or, if there was error, it was not a correctable "scrivener's error", it
10 was simply legal malpractice, for which Ms. Irby's remedy is a lawsuit against her counsel.

11 Rule 60 of the Federal Rules of Civil Procedure and Rule 9024 of the Federal Rules of
12 Bankruptcy Procedure do not authorize the Court to fix this mistake of counsel that occurred in an Adversary
13 Judgment entered almost 10 years ago. In fact, the Court is without jurisdiction to change the judgment which
14 has already been affirmed on appeal. Accordingly, the motion to amend the judgment must be denied.

15 **II. STATEMENT OF FACTS.**

16 The following is supported by the Declaration of Kaipo K.B. Young filed in support of the
17 motion to vacate the renewal of the judgment, a copy of which is filed concurrently with this opposition, along
18 with the exhibits hereto, of which the Court is requested to take judicial notice:

19 1. On November 17, 1988, plaintiff Ireta Irby obtained a default money judgment
20 against defendant Brooks H. Haden for the sum of \$87,450.00 in the United States District Court for the
21 Southern District of Texas, Houston Division, Case No. H-88-1781 ("Texas Judgment").

22 2. On August 20, 1996, plaintiff caused the Texas Judgment to be registered with the
23 United States District Court for the Northern District of California, San Francisco Division, Case No. 3:96-fj-
24 00034-VRW.

25 3. On November 14, 1996 Mr. Haden filed a voluntary petition under chapter 7 of the
26 Bankruptcy Code, Case No. 96-13933, in the United States Bankruptcy Court for the Northern District of
27 California, Santa Rosa Division.

4. Thereafter, on February 13, 1997, plaintiff filed her nondischargeability complaint

1 against Mr. Haden, Adv. Proc. No. 97-01034 ("Adversary Proceeding").

2 5. On April 14, 1998, a trial was held in the Adversary Proceeding. Following the trial,
3 the Court, on April 28, 1998, entered a judgment in favor of plaintiff and against Mr. Haden ("Adversary
4 Judgment"). The Adversary Judgment specifically states as follows:

5 After hearing the evidence and arguments of counsel, judgment is hereby
6 entered in this action against debtor and defendant Brooks H. Haden ("Haden")
7 in favor of plaintiff Ireta Irby ("Irby") **determining that Irby's Judgment**
8 **against Haden, entered on November 17, 1988, in the United States**
9 **District Court for the Southern District of Texas, Civil Action No. H-88-**
10 **1781, is deemed nondischargeable pursuant to Bankruptcy Code Section**
11 **523(a)(2)(A). Irby shall recover her costs of suit in the amount of**
12 **\$685.20.** (Emphasis added)

13 6. On November 18, 1998, The District Court, Judge Fern Smith presiding, affirmed the
14 judgment on appeal. (A copy of the District Court opinion is attached hereto as *Exhibit "A"* for the Court's
15 reference.)

16 7. On August 20, 2006, plaintiff's judgment in the United States District Court for the
17 Northern District of California, San Francisco Division, Case No. 3:96-fj-00034-VRW, expired because it
18 had not been renewed in a timely manner. *Calif. Code Civ. Proc.*, § 683.020.

19 8. On November 8, 2007 plaintiff filed her application for and renewal of the
20 Bankruptcy Court judgment. By way of her application, plaintiff sought to renew her judgment for
21 \$434,673.51, representing the original Texas judgment in the amount of \$87,450.00 plus interest after
22 judgment in the sum of \$347,223.51. However, after defendant moved to vacate the renewal of the judgment
23 on the grounds that this Court's judgment was a declaratory judgment only, plaintiff stipulated to vacate the
24 renewal of the judgment. See, *Exhibit "B"* hereto.

25 9. On December 26, 2007, plaintiff filed a motion to amend the declaratory non-
26 dischargeability judgment in this case. On January 11, 2008, a day after receiving the defendant's opposition
27 to the motion, plaintiff withdrew her motion. Plaintiff also stipulated to vacate the renewal of the adversary
judgment after receiving the defendant's motion to vacate it. See, *Exhibit "C"* hereto.

III. ARGUMENT.

A. **THE BANKRUPTCY COURT LACKS JURISDICTION TO AMEND THE JUDGMENT.**

The bankruptcy court lacks jurisdiction to amend the judgment as requested by plaintiff because the judgment has been affirmed on appeal in its current rendition. *Home Indemnity Co. of New York v. O'Brien*, 112 F.2d 387, 388 (6th Cir. 1940).

In *Home Indemnity Co. of New York v. O'Brien*, upon remand following an appeal, the District Court amended the judgment to add the words “with interest thereon at 5% from July 14, 1935, the date of the institution of the suit, to February 11, 1937, the date of the judgment.” That addition to the judgment, just as the amendment requested here, would have increased the dollar amount of the judgment. However, the Sixth Circuit rejected the amended judgment and held that the District Court was completely without authority to alter the judgment:

Now, therefore, it is the view of this court that the **District Judge was without power to alter a judgment affirmed by us** and that it was his duty, upon the receipt of the mandate, to proceed with the execution of the judgment, and no more; that **this limitation upon the authority of the District Judge to alter the judgment in defiance of the express command of the mandate, is established by a long line of federal cases**, [citations]; and

It being further the view of this court that the rule established by the cited cases has not been modified by Rule 60 of the Rules of Civil Procedure for the District Courts of the United States, 28 U.S.C.A. following section 723c, either by reason of sub-division (a) or sub-division (b) thereof, because failure to include interest in the judgment was not through the mistake, inadvertence or neglect of the District Judge, or of the clerk, but was in pursuance of the direct command of the court with respect to the verdict and the judgment; and

It being further the view of this court that sub-division (a) or (b) or rule 60, while enlarging the power of the District Courts over judgments without respect to the running of the term of court, **does not confer upon District Courts the power to alter or amend a judgment affirmed by this court or by the Supreme Court of the United States, for such alteration or amendment would be not the correction of a mistake, judicial or clerical, but an alteration or amendment of a decision of the reviewing court, which it is not within the power of the District Courts to do.**

In other words, once a judgment has gone up on appeal and been affirmed, the Court loses all authority to alter or amend the judgment. At this stage, the judgment in this adversary proceeding is beyond correction. Accordingly, the motion to amend the judgment must be denied.

B. **NOT INCLUDING THE AMOUNT OF THE
OUTSTANDING TEXAS JUDGMENT IN THE JUDGMENT
HERE WAS A JUDICIAL DETERMINATION AND WAS
NOT AN ERROR.**

1. **Whether Or Not To Include The Amount Of A Prior Judgment
In A Judgment Of Nondischargeability Requires A Judicial
Determination.**

The Adversary Judgment entered on April 28, 1998 states:

After hearing the evidence and arguments of counsel, judgment is hereby entered in this action against debtor and defendant Brooks H. Haden (“Haden”) in favor of plaintiff Ireta Irby (“Irby”) **determining that Irby’s Judgment against Haden, entered on November 17, 1988, in the United States District Court for the Southern District of Texas, Civil Action No. H-88-1781, is deemed nondischargeable pursuant to Bankruptcy Code Section 523(a)(2)(A). Irby shall recover her costs of suit in the amount of \$685.20.** (Emphasis added.)

Thus, by its own terms, the judgment only provides plaintiff with the following limited relief:

- 1) a declaration stating that the Texas judgment entered in the United States District Court for the Southern District of Texas is **nondischargeable**; and
- 2) a money judgment for costs in the amount of \$685.20.

The judgment provides nothing more. Through her motion, however, the plaintiff seeks to include in the money portion of the Adversary Judgment the amount of the original Texas judgment in the amount of \$87,450.00 plus interest after judgment in the sum of \$347,223.51.¹

At the crux of plaintiff’s motion is the proposition that the Court’s failure to include the amount of the Texas judgment was a merely clerical or ministerial error that can be simply corrected now, ten years after entry of the judgment, and even after affirmance of the judgment on appeal. Not so. The decision of a bankruptcy court whether or not to include the monetary amount of a prior judgment is a judicial determination requiring exercise of the court’s discretion and not a mere clerical matter.

Ordinarily, an adversary proceeding to determine dischargeability is considered a declaratory relief action. *Fidelity Nat’l Title Ins. Co. v. Franklin (In re Franklin)*, 179 B.R. 913, 918 (Bankr. E.D. Cal. 1995) [stating that a judgment to determine nondischargeability under § 523 would be a declaratory judgment]. However, in *Cowen v. Kennedy (In re Kennedy)*, 108 F.3d 1015, 1016 (9th Cir. 1997), the

¹ Which amount apparently does not include the original cost judgment amount of \$685.20.

1 Ninth Circuit confirmed that, in addition to a declaratory judgment of nondischargeability, the bankruptcy
2 court has jurisdiction to enter a money judgment in the adversary proceeding. As stated in *Kennedy*: “the
3 Bankruptcy Court has jurisdiction to enter a monetary judgment on a disputed state law claim in the course of
4 making a determination that a debt is nondischargeable.”

5 In *Sasson v. Sokoloff* (*In re Sasson*), 424 F.3d 864 (9th Cir. 2005), the Ninth Circuit
6 declared that a bankruptcy court has the authority to enter a money judgment, despite the existence of a pre-
7 existing state court judgment, when declaring a debt nondischargeable. The court concluded that finding that
8 whether or not the underlying debt was liquidated in a prior judgment was a distinction without a difference.
9 However, in so holding, the Ninth Circuit made clear that the decision whether to enter a money judgment in
10 the amount of the prior judgment required the exercise of the bankruptcy court’s discretion.

11 As stated in *Sasson*:

12 The bankruptcy court here, therefore, had the authority to enter a money judgment in
13 conjunction with its nondischargeability order. **“It does not follow, however, that
14 the court was bound to exercise its authority. And it probably would not and
15 should not have done so except under unusual circumstances such as here
16 exist.”** [*Local Loan Co. v. Hunt*, 292 U.S. [234] at 241 [(1934)]]. The existence
17 of a prior judgment may introduce some prudential concerns, such as comity, that **a
18 bankruptcy court should take into consideration in fashioning relief.** See *Smith
19 v. Lachter* (*In re Smith*), 242 B.R. 694 (B.A.P. 9th Cir. 1999) (noting that the filing
20 of a new money judgment is not necessary when there is an existing effective state
21 court judgment); *Gertsch v. Johnson & Johnson Fin. Corp.* (*In re Gertsch*), 237
22 B.R. 160 (B.A.P. 9th Cir. 1999) (discussing the potential confusion and complication
23 caused by the entry of multiple judgments). Although important considerations, these
24 prudential concerns do not affect the jurisdiction and the power of the bankruptcy
25 court to enter a new money judgment as part of declaring a debt nondischargeable.
26 **Rather, these prudential issues are best committed to the judgment of the
27 bankruptcy court, subject to review for abuse of discretion.** [*Graves v.
Myrvang* (*In re Myrvang*), 232 F.3d [1116,] at 1122 [(9th Cir. 2000)]].

21 In *Sasson*, the debtor sought to use Rule 60(b) to challenge the bankruptcy court’s
22 jurisdiction to enter a money judgment in addition to a judgment of nondischargeability. The court found that
23 the debtor had engaged in “wilful and malicious behavior” in rendering the initial state court judgment
24 uncollectible. Because the debtor was “clearly attempting to manipulate both the federal and state court
25 systems to avoid paying the debt, which the bankruptcy court has found non-dischargeable”, the Ninth Circuit
26 upheld the bankruptcy court’s exercise of its discretion to enter a money judgment in addition to a declaration
27 that the debt was nondischargeable.

Although the creditor here did not ask for and did not obtain a new judgment from this Court

1 in the amount of the underlying Texas judgment, and it is too late to ask the Court for that money judgment,
 2 the same factors that supported entry of a money judgment in *Sasson* do not appear here. Unlike *Sasson*, in
 3 which the prior state court judgment had been rendered uncollectible and the debtor had committed fraud
 4 subsequent to entry of the state court judgment, the debtor here has done nothing to interfere with or avoid
 5 enforcement of the judgment.

6 The problem here is of the creditor's own doing. It is the creditor that allowed the District
 7 Court money judgment to lapse. Unlike *Sasson*, where there was just a state court judgment and a
 8 bankruptcy court money judgment, in this case it would have been quite absurd for the creditor to ask this
 9 Court for a money judgment. Plaintiff already had a judgment from the U.S. District Court in Texas and a
 10 "new"² ten-year judgment entered in the U.S. District Court for the Northern District of California in Case
 11 No. 3:96-fj-00034-VRW. There was no rationale for having this Court enter a third judgment on the
 12 underlying debt. The problem here is that the creditor apparently lost track of what judgment needed to be
 13 renewed and failed to renew the Northern District of California money judgment before it expired.

14 Thus, the entry of a money judgment on the underlying debt in a nondischargeability action is
 15 not a clerical or ministerial act which can be "corrected". It is a judicial act requiring exercise of the court's
 16 sound discretion. It follows then that the failure to enter a money judgment on the underlying debt here was
 17 not a "clerical" error in any sense of the phrase, but rather a judicial determination that cannot be disturbed
 18 nine years later and after affirmance on appeal.

19 Consequently, there is no provision in the law for the Court to "correct" the judgment to now
 20 include the amount of the underlying Texas judgment.

21 2. The Concept Of A "Scrivener's Error" Does Not Apply To 22 This Scenario.

23 Contrary to plaintiff's papers, the omission of the amount of the Texas judgment in this

24 ² Registration of foreign judgment in the District Court creates a "new" judgment good for ten years. See, *Marx*
 25 *v. Go Publishing Company*, 721 F.2d 1272, 1273 (9th Cir. 1983). Rule 69 of the Federal Rules of Civil
 26 Procedure dictates that district courts must follow state practice regarding the collection and enforcement of
 27 judgments. *Ortland v. County of Tehama*, 939 F. Supp. 1465, 1473 (E.D. Cal. 1996). 28 U.S.C. § 1963
 requires that the district court to enforce Ms. Irby's Texas judgment registered in California in the same manner
 as any California judgment. *Gagan v. Sharar*, 376 F.3d 987 (9th Cir. 2004) ["A judgment so registered shall
 have the same effect as a judgment of the district court of the district where registered and may be enforced in
 like manner."]

1 Court's judgment is not a "scrivener's error." In fact, that term does not even apply to such a scenario. A
 2 "scrivener's error" refers to a mistake of expression in a statute, not the failure to include certain language in a
 3 judgment.³ Defendant's counsel has found no instance of a court amending a judgment in the guise of
 4 correcting a "scrivener's error" and plaintiff has failed to offer any authority for the relief she seeks.

5 **C. THE REQUESTED AMENDMENT IS NOT AVAILABLE**
 6 **UNDER EITHER RULE 60(a) NOR RULE 60 (b).**

7 **1. Rule 60(a) Is Not Available To Fix The Plaintiff's Failure To**
 8 **Obtain A Money Judgment In 1998.**

9 Rule 60(a) of the Federal Rules of Civil Procedure, made applicable by Rule 9024 of the
 10 Federal Rules of Bankruptcy Procedure, provides for the correction of "clerical mistakes":

11 The court may correct a clerical mistake or a mistake arising from oversight or
 12 omission whenever one is found in a judgment, order, or other part of the record. The
 13 court may do so on motion or on its own, with or without notice. But after an appeal
 14 has been docketed in the appellate court and while it is pending, such a mistake may
 15 be corrected only with the appellate court's leave

16 A leading treatise has described the function of Rule 60(a) thusly: "[A] motion under Rule
 17 60(a) can only be used to make the judgment or record speak the truth and cannot be used to make it say
 18 something other than what originally was pronounced." 11 Wright & Miller, *Federal Practice & Procedure*,
 19 § 2854 at 149 (1973).

20 As previously discussed, the judgment here was only a declaration of nondischargeability and
 21 for costs of suit. Plaintiff neither asked for nor obtained a monetary judgment in the amount of the underlying
 22 Texas judgment; and there was no reason for her to do so, because she had a monetary judgment from the
 23 U.S. District Court for the Northern District of California in Case No. 3:96-fj-00034-VRW. Now, because
 24 plaintiff mistakenly allowed that District Court judgment to lapse without timely renewal, she wants this Court
 25 to abuse Rule 60(a) and make it speak in a manner that it was never intended. Rule 60(a) is not available to
 26 plaintiff for that purpose.

27 ³ Justice Antonin Scalia defines a "scrivener's error" as a case "where on the very face of the statute it is clear
 to the reader that a mistake of expression (rather than of legislative wisdom) has been made." Antonin Scalia,
*Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting
 the Constitution and the Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE
 LAW 3,20 (Amy Gutmann ed., 1997). See also, Jonathan R. Seigel, *What Statutory Drafting Errors Teach Us
 About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309 (2001) and Michael S. Fried, *A Theory of
 Scrivener's Error*, 52 RUTGERS L. REV. 589 (2000).

2. **A Rule 60(b) Motion On Grounds Of Mistake Must Be Made Within 1 Year.**

The moving papers freely admit that plaintiff make a mistake in not seeking a money judgment from this Court in the amount of the Texas judgment. Such a “mistake” can only be corrected under Rule 60(b), subpart (1) and must be sought within a year. Plaintiff’s attempt to fall within subpart (6) of Rule 60(b) is obviously to avoid the one year limitation, even though plaintiff’s papers do not acknowledge that is her gambit. Plaintiff has not cited any legal authority for the proposition that a party’s failure to seek particular relief in a judgment nine years ago is the sort of “any other reason that justifies relief” that Rule 60(b)(6) was designed to address, and it surely does not serve that function. See, *In re McAuley*, 66 B.R. 696 (BAP 9th Cir. 1986) [Rule 60 not available to insert the words “annulment” or “the stay is annulled” into a judgment].

Indeed, the one case that plaintiff cites dealing with Rule 60(b), *West Texas Marketing Corp. v. Kellogg*, 12 F.3d 497 (5th Cir. 1994), holds that the Rule cannot be used to change the essential nature of the judgment. See, *United States v. Talley Def. Sys.*, 393 F. Supp. 2d 964, 968-969 (D.Ariz. 2005). It can only be used to clarify what was already in the judgment. In this case, the amount of the underlying Texas judgment was not made a part of the nondischargeability judgment and Rule 60(b) does not permit the Court to add that into the judgment now.

D. NEITHER THE PLAINTIFF’S COUNSEL’S DECLARATION REGARDING INTEREST NOR THE ABSTRACTS OF JUDGMENT SUPPORT AMENDMENT OF THE JUDGMENT.

The only support that plaintiff offers for her motion to amend the judgment is that her counsel submitted a declaration to the Clerk of the Court in February 1999 in connection with requesting that the Clerk issue an Abstract of the Judgment. However, the fact is that Ms. Nelson used a false Declaration to mislead the Clerk into issuing an Abstract of Judgment, reciting that a judgment was entered by this Court on April 30, 1998, and that the judgment was in the amount of \$87,500, plus interest of \$102,623, plus costs of \$685.20. Obviously, the judgment is not in those amounts, and this motion admits that it was, at the least, a “mistake” that judgment did not include those amount and is only in the amount of \$685.20. The fact that plaintiff’s counsel misled the Clerk into issuing a false Abstract of Judgment is no evidence whatsoever to support the motion to amend the judgment. Indeed, upon denial of this motion, plaintiff’s counsel has an obligation to withdraw the false Abstracts.

1 What is so disturbing about plaintiff's "evidence" in support of her motion, is that the
2 Amended and Corrected Declaration of Rhonda L. Nelson Regarding Post-Judgment Interest 28 U.S.C. §
3 1961 does not attach a copy of the actual judgment in this case (which is the only one as to which this Court's
4 Clerk should have issued an Abstract), but attaches and relies upon two documents, (1) the judgment entered
5 in the U.S. District Court for the Southern District of Texas on November 17, 1988, and (2) the Certification
6 of Judgment for Registration in Another District, filed in the U.S. District Court for the Northern District of
7 California on August 20, 1996. The absence of this Court's judgment in the Declaration coupled with the
8 presence of the Texas judgment documents demonstrates that Ms. Nelson knew on February 2, 1999 that the
9 only monetary judgment extant was the Texas judgment registered in the Northern District of California and
10 not this Court's judgment.

11 In any event, what Ms. Nelson informed the Clerk and what the Clerk issued in its Abstract is
12 not evidence of any "clerical mistake" or "scrivener's error" on the part of the Court. If plaintiff is subtly
13 asking the Court to infer some sort of waiver or estoppel because of those documents, it is absurd. There is
14 no evidence whatsoever that the defendant ever received any notice of those documents. The Declaration
15 does not have a proof of service and the Abstracts show only the address at which the Adversary complaint
16 was served in 1998. It would be a violation of the defendant's right to due process to enter any sort of order
17 based upon documents of which he had no notice and as to which he had no opportunity to be heard.

18 **E. PLAINTIFF HAS FAILED TO MAKE ANY LEGAL**
19 **ARGUMENTS IN SUPPORT OF HER MOTION TO**
20 **AMEND THE JUDGMENT, DESPITE HER AWARENESS**
21 **OF DEFENDANT'S ARGUMENTS IN OPPOSITION TO**
22 **THE PRIOR MOTION.**

23 Notwithstanding the fact that plaintiff was provided with all of the foregoing legal arguments in
24 the opposition that defendant filed and served to plaintiff's prior motion to amend the judgment, which plaintiff
25 subsequently withdrew, plaintiff has not offered any substantive arguments to support her second motion to
26 amend the judgment. Plaintiff had a duty to present in her motion whatever points and authorities that she
27 could muster to counter the foregoing substantive arguments. As one bankruptcy court has stated: "Litigants
are bound to address contrary authority. See *Fed.R.Bankr.P.* 9011(b)(2)." *In re Estes*, 254 B.R. 261, 265,
fn. 10 (Bankr. D.Idaho 2000).

1 Because plaintiff had a duty to address the contrary authorities advanced in opposition to the
2 prior motion, it must be assumed that plaintiff is unable to locate any contrary authority and unable to present
3 contrary substantive arguments. Indeed, it must also be inferred from plaintiff's prior withdrawal of her motion
4 to amend the judgment that plaintiff's counsel found defendant's arguments in opposition to the prior motion to
5 amend sufficiently compelling that plaintiff conceded that there were no proper grounds for amendment of the
6 judgment. Plaintiff should be estopped to renew her withdrawn motion; particularly as she has offered no
7 substantive support for the motion in opposition to defendant's arguments.

8 For the failure to present any substantive support for this motion, the motion should be denied.
9 *Fed.R.Bankr.P.* 9011(b)(2).

10 **IV. CONCLUSION.**

11 For the reasons set forth above, plaintiff is not entitled to the requested relief under any theory
12 or Rule and the motion to amend the judgment must be denied.

13 DATED: April 10, 2008.

BARTLETT, LEADER-PICONE & YOUNG, LLP

14
15 BY: /s/ Malcolm Leader-Picone #104620
MALCOLM LEADER-PICONE
16 Attorneys for Defendant
17 BROOKS H. HADEN
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PROOF OF SERVICE BY MAIL

I, Malcolm Leader-Picone, declare that:

I am employed in the County of Alameda, California. I am over the age of eighteen years and not a party to the within action. My business address is 2201 Broadway, Suite 803, Oakland, CA 94613.

On April 10, 2008, I served the following document(s) entitled:

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S SECOND MOTION TO AMEND
JUDGMENT**

upon the following person(s) in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Oakland, California addressed as follows:

Rhonda I. Nelson, Esq. Severson & Werson A Professional Corporation One Embarcadero Center, Suite 2600 San Francisco, CA 94111
--

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Oakland, California, on April 10, 2008.

/s/ Malcolm Leader-Picone #104620

Malcolm Leader-Picone